2024-1757

Volume I (Appx0001-3119)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellee.

v.

ERIC ALAN ISAACSON, Interested Party-Appellant

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

CORRECTED JOINT APPENDIX
VOLUME I (Appx0001-3119)

ERIC ALAN ISAACSON
6580 Avenida Mirola
LAW OFFICE OF ERIC ALAN ISAACSON
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
Email: ericalanisaacson@icloud.com

Interested Party-Appellant

Table of Contents

Volume II

Volume III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
v.	)	Civil Action No. 16-0745 (PLF)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

OPINION

For over fifteen years, PACER fees – the per-page fees that the federal judiciary charges the public for online access to court documents – have been a subject of controversy. As a result of the litigation in this case, the United States will return over $100 million of these fees to users of PACER. Today, this litigation substantially comes to a close.

The Court has before it a motion of class representatives National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice (the "Named Plaintiffs") for final approval of a settlement agreement that would resolve the pending claims of hundreds of thousands of plaintiffs and reimburse them for PACER fees that the judiciary unlawfully used to fund certain non-PACER services. Counsel for the Named Plaintiffs also request attorney's fees, costs, and service awards.

After careful consideration of the arguments made by the Named Plaintiffs and by the government, and of the comments and objections by interested persons submitted to the Court and made at the hearing held on October 12, 2023, the Court will approve the settlement

agreement and award $23,863,345.02 in attorney's fees, $1,106,654.98 in costs, and $30,000 in service awards.[1]

[1] The filings and attachments considered by the Court in connection with this matter include: Complaint ("Compl.") [Dkt. No. 1]; Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment ("Mot. to Dismiss") [Dkt. No. 11]; Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents, Exhibit 3 ("Class Cert. Web Notice") [Dkt. No. 42-5]; Notice of Filing of Revised Notice Documents, Exhibit 1 ("Class Cert. Email Notice") [Dkt. No. 43-1]; Plaintiffs' Motion for Summary Judgment as to Liability ("Pls.' Summ. J. Mot.") [Dkt. No. 52]; Declaration of Jonathan E. Taylor, Exhibit B ("1997 AO Report") [Dkt. No. 52-3]; Declaration of Jonathan E. Taylor, Exhibit E ("Jud. Conf. Letter") [Dkt. No. 52-6]; Declaration of Jonathan E. Taylor, Exhibit H ("Lieberman Letter") [Dkt. No. 52-9]; Plaintiffs' Statement of Undisputed Material Facts ("Pls.' Facts") [Dkt. No. 52-16]; Defendant's Cross-Motion for Summary Judgment ("Def.'s Summ. J. Mot.") [Dkt. No. 74]; Declaration of Wendell A. Skidgel Jr. ("Skidgel Decl.") [Dkt. No. 74-2]; Defendant's Statement of Material Facts as to Which There is No Genuine Dispute and Response to Plaintiffs' Statement of Undisputed Material Facts ("Def.'s Facts") [Dkt. No. 74-3]; Declaration of Wendell A. Skidgel Jr. ("2d Skidgel Decl.") [Dkt. No. 81-1]; Notice of Submission of Revised Proposed Order and Revised Notice Documents, Exhibit 5 ("Sett. Web Notice") [Dkt. No. 152-5]; Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Pls.' Sett. Mot.") [Dkt. No. 158]; Declaration of Renée Burbank ("Burbank Decl.") [Dkt. No. 158-1]; Declaration of Stuart T. Rossman ("Rossman Decl.") [Dkt. No. 158-2]; Declaration of Rakim Brooks ("Brooks Decl.") [Dkt. No. 158-3]; Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.") [Dkt. No. 158-4]; Declaration of Deepak Gupta ("Gupta Decl.") [Dkt. No. 158-5]; Declaration of Meghan S.B. Oliver ("Oliver Decl.") [Dkt. No. 158-6]; Declaration of Gio Santiago Regarding Implementation of Settlement Notice Program ("KCC Decl.") [Dkt. No. 158-7]; Defendant's Response to Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Def.'s Resp.") [Dkt. No. 159]; Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Pls.' Reply") [Dkt. No. 160]; Supplemental Declaration of Brian T. Fitzpatrick ("Fitzpatrick Supp. Decl.") [Dkt. No. 160-1]; Declaration of William B. Rubenstein in Support of Class Counsel's Motion for Attorneys' Fees ("Rubenstein Supp. Decl.") [Dkt. No. 160-2]; Supplemental Declaration of Deepak Gupta ("Gupta Supp. Decl.") [Dkt. No. 160-3]; Declaration of Meghan S.B. Oliver ("Oliver Supp. Decl.") [Dkt. No. 160-4]; Declaration of Gio Santiago Regarding Settlement Administration Costs ("KCC Supp. Decl.") [Dkt. No. 160-5]; Plaintiff-Class Member Don Kozich's Verified Objections to Settlement and Motion to Appear Telephonically or by Zoom ("Kozich Obj. and Mot.") [Dkt. No. 163]; Plaintiffs' Response to Objection of Don Kozich ("Resp. to Kozich Obj.") [Dkt. No. 165]; and Plaintiffs' Notice of Filing of All Objections Received to Date ("Compiled Objs.") [Dkt. No. 166].

The Court also reviewed the following objections to the settlement agreement: Objection of Aaron Greenspan ("Greenspan Obj.") [Dkt. No. 166-1]; Objection of Alexander Jiggetts ("Jiggetts Obj.") [Dkt. No. 166-2]; Objection of Geoffrey Miller ("Miller Obj.") [Dkt.

I. BACKGROUND

A. Origin and History of PACER Fees

Before the late 1980s, federal courts operated on paper. If members of the public wanted to view court dockets or filings, they had to travel to the courthouses where those records physically existed. Then, in 1988, the judiciary "authorized an experimental program of electronic access for the public to court information." JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS 83 (Sept. 14, 1988), www.uscourts.gov/file/1642/download [perma.cc/HKS6-4B34]. This experiment gave rise to the Public Access to Court Electronic Records system, or "PACER." Pls.' Facts ¶ 1. PACER allows the public to access court documents without the need to review physical records or travel to the courthouse to access them. 25 Years Later, PACER, Electronic Filing Continue to Change Courts, U.S. CTS. (Dec. 9, 2013), www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts [perma.cc/92NB-8BM7].

Originally, PACER worked via a dial-up phone connection and users were charged fees by the minute. 25 Years Later, PACER, Electronic Filing Continue to Change Courts, supra. But in 1998, PACER moved online, and the judiciary started charging users on a per-page basis. See Def.'s Facts ¶ 16. Around the same time, the judiciary began to use PACER

No. 166-3]; Objection of Eric Isaacson ("Isaacson Obj.") [Dkt. No. 166-5]; and Written Statement of Eric Alan Isaacson of Intent to Appeal in Person at the October 12, 2023, Final-Approval Hearing ("Isaacson Stmt.") [Dkt. No. 166-6].

The Court also reviewed the following prior opinions in this case: Nat'l Veterans Legal Servs. Program v. United States, Civil Action No. 16-0745, 2016 WL 7076986 (D.D.C. Dec. 5, 2016) ("Motion to Dismiss Op."); Nat'l Veterans Legal Servs. Program v. United States, 235 F. Supp. 3d 32 (D.D.C. 2017) ("Class Certification Op."); Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123 (D.D.C. 2018) ("Summary Judgment Op."); and Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340 (Fed. Cir. 2020) ("Federal Circuit Op.").

fees to pay for programs other than PACER, like Case Management / Electronic Case Filing ("CM/ECF"), a new system that allowed parties to file documents electronically. See 1997 AO Report at 36; Pls.' Facts ¶ 9. By fiscal year 2000, the judiciary was using the fees to pay for PACER-related costs, CM/ECF-related costs, and Electronic Bankruptcy Noticing ("EBN") costs. 2d Skidgel Decl. ¶ 31; id. tab 30; see Summary Judgment Op., 291 F. Supp. 3d at 131.

In 2002, Congress passed the E-Government Act, a statute whose broad purpose was to improve electronic services and processes in government. See E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899. As relevant to this litigation, the Act amended the statutory note to 28 U.S.C. § 1913 ("Section 1913 Note") so that it read:

> COURT FEES FOR ELECTRONIC ACCESS TO INFORMATION
>
> [. . . .]
>
> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services.

28 U.S.C. § 1913 note (internal quotation marks omitted); see E-Government Act of 2002, § 205(e). The Senate Governmental Affairs Committee explained:

> The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

S. REP. NO. 107-174 at 23 (June 24, 2002). At that point, PACER fees were set at $0.07 per page. See Skidgel Decl. Ex. G at 64.

But PACER fees continued to rise. Effective January 2005, the Judicial Conference increased fees to $0.08 per page. Jud. Conf. Letter at 1. The Director of the Administrative Office of the United States Courts explained that the increase was "predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance." Id.

By the end of 2006, the judiciary had accumulated $32.2 million of excess revenue from PACER fees. Pls.' Facts ¶ 16; Summary Judgment Op., 291 F. Supp. 3d at 134. For that reason, the judiciary further expanded the categories of programs that would be funded by the fees. See Summary Judgment Op., 291 F. Supp. 3d at 134-35. These programs included CM/ECF, EBN, courtroom technology upgrades, an online Jury Management System ("Web Juror"), a Violent Crime Control Act ("VCCA") notification system, and a study to determine the feasibility of providing access to state court documents through CM/ECF (the "State of Mississippi Study"). 2d Skidgel Decl. tab 11, tab 12; see Summary Judgment Op., 291 F. Supp. 3d at 135. In 2012, the judiciary increased PACER fees to $0.10 per page. Pls.' Facts at ¶ 22.

PACER fees have been controversial since at least 2008. That year, a group of activists attempted to download significant portions of the court documents available on PACER and make them available for free. John Schwartz, An Effort to Upgrade a Court Archive System to Free and Easy, N.Y. TIMES (Feb. 12. 2009), www.nytimes.com/2009/02/13/us/13records.html. These activists, along with scholars and public officials, argued that PACER fees make it difficult for the public to access information integral to understanding our country's law and legal system. E.g., Timothy B. Lee, The Case Against PACER: Tearing Down the Courts' Paywall, ARSTECHNICA (Apr. 9, 2009), www.arstechnica.com/tech-policy/2009/04/case-against-pacer [perma.cc/X52V-RYQT]; see also Pls.' Sett. Mot. at 5 ("High PACER fees hinder equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts.").

In 2009, Senator Joe Lieberman, sponsor of the E-Government Act, expressed concern that the judiciary may have been violating the Act by collecting PACER fees "well higher than" the cost of funding PACER. Lieberman Letter at 1. Still, this trend continued. From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected more than $920 million in PACER fees; the total amount collected annually increased from about $102.5 million in 2010 to $146.4 million in 2016. See Pls.' Facts ¶¶ 28, 46, 62, 80, 98, 116, 134.

B. Procedural History

The current litigation began in April 2016, when the Named Plaintiffs filed a class-action lawsuit against the United States alleging that the judiciary had violated the

E-Government Act by charging excessive PACER fees. Compl. ¶¶ 1-3, 34.[2] The Named Plaintiffs alleged jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a). Id. ¶ 33. The Named Plaintiffs were, and still are, represented by Gupta Wessler LLP and Motley Rice LLC ("Class Counsel").

The United States moved to dismiss. See Mot. to Dismiss. The government argued that the Court lacked jurisdiction, id. at 15-19, that the Named Plaintiffs could not sue without first alerting the PACER Service Center, id. at 13-15, and that other similar class action lawsuits challenging PACER fees should be litigated first under the "first-to-file rule." Id. at 12-13. This Court denied the motion to dismiss. See Motion to Dismiss Op., 2016 WL 7076986. In January 2017, the Court certified a class. See Class Certification Op., 235 F. Supp. 3d 32. The class consisted of "[a]ll individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities." Id. at 39. These class members were given notice and an opportunity to opt out. Gupta Decl. ¶ 14; see Order Approving Plan of Class Notice ("1st Notice Appr.") [Dkt. No. 44]. The parties then engaged in informal discovery, which clarified what categories of expenses were funded by PACER fees. Gupta Decl. ¶ 15.

In August 2017, the Named Plaintiffs filed a motion seeking "summary adjudication of the defendant's liability, reserving the damages determination for after formal discovery." Pls.' Summ. J. Mot. at 1. The United States then filed a cross-motion for summary judgment as to liability. Def.'s Summ. J. Mot. at 1. In these motions, the parties asked the Court to decide the central question in the case: Under the E-Government Act, what categories of

[2] Judge Ellen Segal Huvelle presided over this case until her retirement, at which time the case was reassigned to the undersigned.

expenses may be funded by PACER fees? See id. at 1-2; Pls.' Summ. J. Mot. at 1. The Named Plaintiffs argued that the Act "prohibits the [judiciary] from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER," so none of the additional categories of expenses were permitted. Pls.' Summ. J. Mot. at 11. The United States urged a broader reading of the statute which would allow the judiciary to "charge fees, as it deems necessary, for the provision of information to the public through electronic means," making all of the additional categories of expenses lawful. Def.'s Summ. J. Mot. at 11.

The Court rejected both positions, holding that the government's interpretation of the E-Government Act was too broad, but that the Named Plaintiffs' interpretation was too narrow. See Summary Judgment Op., 291 F. Supp. 3d at 141-44. The Court concluded that the judiciary "properly used PACER fees to pay for CM/ECF and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most of the expenditures for [c]ourtroom [t]echnology." Id. at 146. Using PACER fees to pay for these expenses was improper because the programs failed to further "the public's ability to access information on the federal court's CM/ECF docketing system." Id. at 150.

The parties cross-appealed to the United States Court of Appeals for the Federal Circuit. In August 2020, the Federal Circuit affirmed this Court's interpretation. See Federal Circuit Op., 968 F.3d at 1359. The Federal Circuit wrote that Judge Huvelle "got it just right" in interpreting the E-Government Act to "limit[] PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." Id. at 1343, 1350. The Named Plaintiffs' interpretation failed because it "combine[d] part of the first sentence of paragraph (a) [of the Section 1913 Note] ('The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . .') with two parts of

the last sentence of paragraph (b) ('to reimburse expenses incurred in providing' the 'services rendered,' which plaintiffs construe to mean PACER access), paying little heed to the substantial amount of text in between." Id. at 1350. Instead, the full text of the Section 1913 Note, along with its legislative history, made clear that the E-Government Act "limits the use of PACER fees to expenses incurred in providing (1) electronic access for members of the public (2) to information stored on a federal court docketing system." Id. at 1351-52.[3]

Applying this interpretation to the contested categories of expenses, the Federal Circuit agreed with this Court that it was unlawful for the judiciary to use PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most courtroom technology expenses. Federal Circuit Op., 968 F.3d at 1358. The appellate court declined to decide whether it was lawful for PACER fees to fund all CM/ECF expenditures, holding that the issue was not properly before it and remanding to this Court for further proceedings. Id. at 1358-59.

After remand, the parties began settlement discussions. See Gupta Decl. ¶¶ 23-24. Even after the Federal Circuit ruling, the government took the position that it did not owe damages to class members because the class could not prove that PACER fees would have been lower if the judiciary had refrained from making the unlawful expenditures. Id. ¶ 23. The government also maintained that all CM/ECF expenditures were properly funded by PACER fees. Id. The Named Plaintiffs disagreed with both positions. Id.

In May 2021, the parties engaged in an all-day mediation session with Professor Eric Green. Gupta Decl. ¶ 25. During the mediation, the parties agreed to a common-fund settlement structure and the United States made a "final offer" for the total amount of the fund.

[3] The Federal Circuit also held that the Little Tucker Act granted jurisdiction over the lawsuit because the E-Government Act was sufficiently "money-mandating." Federal Circuit Op., 968 F.3d at 1347-49.

Id. ¶ 26. Over the next few weeks, Professor Green continued to mediate, and the parties agreed on a fund amount of $125 million. See id. ¶ 27. Reaching agreement on the remaining sticking points – including how the fund would be distributed, what would happen to unclaimed money, and the scope of the release of legal claims – took many months more. Id. ¶¶ 27-28. In July 2022, the parties executed a settlement agreement, which they amended once in September 2022 and again in April 2023 (collectively, the "Agreement"). Id. ¶ 28; see id. Ex. A ("Sett. Agreement"); id. Ex. B ("First Supp. Agreement"); id. Ex. C ("Second Supp. Agreement").

On May 8, 2023, the Court granted preliminary approval of the Agreement and scheduled a hearing to consider final approval for October 12, 2023 (the "Settlement Hearing"). See Order Granting Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement ("Prelim. Approval") [Dkt. No. 153] at ¶¶ 1, 3. At that time, the Court certified a revised settlement class. Id. ¶ 7. The settlement class included all members of the original class who did not opt out, plus those meeting the same criteria who had paid PACER fees before May 2018 but after the original class was certified. Id. The Court directed that notice of the Agreement and its terms be provided to the settlement class. Id. ¶¶ 15, 16, 18. Using the government's PACER registration data, the claims administrator identified members of the class to be notified. Id. ¶ 13; KCC Decl. ¶¶ 5-7.

In July 2023, the claims administrator sent the court-approved settlement notice, both through email and through postcards, to over 500,000 PACER account holders. KCC Decl. ¶¶ 8-11. These notices provided class members with the settlement amount, an overview of the litigation, information about opting out and submitting objections, and a link to additional information and the full Agreement on a website dedicated to the settlement. Id. Ex. B; see PACER FEES CLASS ACTION, www.pacerfeesclassaction.com [https://perma.cc/N4L5-AYHS].

Objections could be filed by mailing or emailing Class Counsel and the Court. See Sett. Web Notice at 5. Because some class members already had the opportunity to opt out when the original class was certified, the notice sent to them did not include the option to opt out. KCC Decl. ¶8; see id. Ex. A. The claims administrator also issued publication notice through a widely disseminated press release and a banking newsletter. Id. ¶¶ 12, 13.

There were a few hiccups in the notice process. First, the initial notice omitted some class members who were part of the original class. KCC Decl. ¶ 15. Second, the notice sent to some members of the original class incorrectly indicated that they had another opportunity to opt out. Id. ¶ 16. The settlement administrator corrected both mistakes and sent new notices on August 7, 2023. Id. ¶¶ 15, 16. Thirty-three individuals timely opted out of the settlement class.[4] Five individuals filed objections. See Compiled Objs.[5]

On August 28, 2023, the Named Plaintiffs moved for final approval of the class settlement and for attorney's fees, costs, and service awards. Pls.' Sett. Mot. The Court held the Settlement Hearing on October 12, 2023. Class Counsel, as well as representatives for each of the three Named Plaintiffs, gave statements in support of the Agreement. Two objectors spoke in opposition to the Agreement. Then the Court gave the parties an opportunity to respond to

[4] While the Named Plaintiffs initially stated that thirty-four individuals timely opted out, Pls.' Sett. Mot. at 13, the parties clarified at the Settlement Hearing that they had included a duplicate in their count and that the correct number is thirty-three. In addition, the parties clarified at the Settlement Hearing that sixteen individuals attempted to opt out after the opt out deadline. But none of these sixteen individuals were actually eligible to opt out, as all were either part of the original class and had the opportunity to opt out in 2017, or were federal employees who were never part of the class to begin with. See id.

[5] These individuals were: Aaron Greenspan, Alexander Jiggetts, Geoffrey Miller, Don Kozich, and Eric Isaacson. Of the written objections, two of the five were timely (Mr. Miller's and Mr. Isaacson's), and one of the three untimely objections was filed by an individual who is likely not a class member (Mr. Kozich). Nevertheless, the Court has considered all five objections filed.

written and oral objections. Finally, the Court heard from the parties and from objectors on the issue of attorney's fees.

II. THE SETTLEMENT AGREEMENT

The Agreement creates a common fund of $125 million and provides for the distribution of at least 80% of that fund to the hundreds of thousands of persons or entities who paid PACER fees between April 21, 2010 and May 31, 2018 (the "Class Period").

A. The Settlement Class and Fund

The settlement class includes all persons or entities who paid PACER fees in the period beginning six years before the Named Plaintiffs filed their original complaint (April 22, 2010) and ending on the date the judiciary stopped using PACER fees to fund prohibited expenses (May 31, 2018) – with the exception of those who opted out, of federal agencies, and of Class Counsel. Sett. Agreement ¶ 3; First Supp. Agreement; see Pls.' Sett. Mot. at 11. This class includes at least several hundred thousand members. See Class Certification Op., 235 F. Supp. 3d at 39.

The settlement common fund totals $125 million. Sett. Agreement ¶ 11. From this fund, at least 80%, or $100 million, is to be distributed to class members. Id. ¶ 18. Up to 20%, or $25 million, is to be used for attorney's fees, litigation expenses, and service awards for the class representatives. Id. ¶ 28. As to the attorney's fees and service awards, the Agreement specifies that "the Court will ultimately determine whether the amounts requested are reasonable." Id. The Agreement further specifies that service awards cannot exceed $10,000 per class representative. Id.

B. Fund Allocation and Distribution to Class Members

The Agreement allocates the common fund to class members through a two-step calculation. See Sett. Agreement ¶ 19. First, all class members are allocated either $350 or, if they paid less than $350 in PACER fees during the Class Period, the actual amount that they paid. Id. Second, class members who paid over $350 receive, in addition to the first $350, a pro rata allocation of the remaining common fund. Id. This pro rata allocation compares the amount that a given class member paid over $350 to the amounts that other class members paid over $350, and allots the remaining common fund accordingly. See id. To illustrate the calculation, if a class member paid $100 in PACER fees during the Class Period, they will get all of it back. See id. ¶¶ 19, 20. But if a class member paid $1000 in PACER fees during the Class Period, they will get $350 plus an amount from the remaining common fund proportional to the additional $650 that they paid. See id. If there is unclaimed money after these allocations are distributed to class members, then the rest of the common fund will be distributed to class members who have not been fully reimbursed for the PACER fees they paid during the Class Period and who successfully collected their first distribution. Id. ¶ 23.

In contrast to most class action settlements, class members will not need to submit claims to get their share of this common fund. See Pls.' Sett. Mot. at 13. Instead, the claims administrator will use the information provided to them by the government – which has comprehensive records of PACER registrants and the fees they paid – to identify class members and distribute their payments. See id.; Sett. Agreement ¶¶ 14, 21, 23; KCC Decl. ¶¶ 5-7. The claims administrator will disburse the first set of payments within 180 days of receiving the settlement fund from the government, and will distribute any remaining money three months after that. Second Supp. Agreement ¶ 21; Sett. Agreement ¶ 24.

III. FAIRNESS

Under Rule 23 of the Federal Rules of Civil Procedure, no class action may be dismissed, settled, or compromised without the approval of the Court. FED. R. CIV. P. 23(e). Before giving its approval, the Court must direct the provision of adequate notice to all members of the class, conduct a hearing, and find, after notice and a hearing, that the settlement is "fair, reasonable, and adequate." Id.; see Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998); In re Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 26 (D.D.C. 2011). In performing this task, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action. See WILLIAM B. RUBENSTEIN, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:40 (6th ed. 2023).

To determine whether a settlement is fair, reasonable, and adequate, the Court "looks to the 'paramount twin elements of procedural and substantive fairness.'" Mercier v. United States, 156 Fed. Cl. 580, 584 (2021) (quoting Courval v. United States, 140 Fed. Cl. 133, 139 (2018) (internal quotation marks omitted)). The Federal Rules instruct the Court to consider a variety of factors in doing so. The first two of these factors are procedural: whether "(A) the class representatives and class counsel have adequately represented the class; [and] (B) the proposal was negotiated at arm's length." FED. R. CIV. P. 23(e)(2). The remaining factors are substantive; the Court is to consider whether:

> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Id.

Having carefully considered the parties' arguments and all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court concludes that the settlement is fair, reasonable, and adequate.

A. Procedural Fairness

The Court finds that the Named Plaintiffs and Class Counsel have more than "adequately represented" the class. See FED. R. CIV. P. 23(e)(2)(A). The Named Plaintiffs are nonprofit organizations who pay PACER fees despite their nonprofit status, and whose members experienced real burdens because of the fees. Class Certification Op., 235 F. Supp. 3d at 42. These characteristics made them "particularly good class representatives." Id. The two law firms representing the class, in tandem, have extensive experience both in class actions and in lawsuits against the federal government. See Gupta Decl. ¶¶ 45-48, 50-55, 59-61; see also infra Section IV.B.1.

The Named Plaintiffs and Class Counsel have vigorously litigated this case for nearly eight years, over seven of them after the class was certified. See Gupta Decl. ¶¶ 11-13. They engaged in informal discovery, argued (and, in part, won) summary judgment, and successfully defended the summary judgment ruling on appeal. See id. ¶¶ 14-21; see also infra Section IV.B.2. After remand, they engaged in extensive settlement negotiations with the government. Gupta Decl. ¶¶ 23-28.

By all accounts, these settlement negotiations happened at "arm's length," indicating no collusion between the parties. See FED. R. CIV. P. 23(e)(2)(B). Negotiations came at a point in the litigation where liability was resolved but there were still significant questions about the possibility, and amount, of damages. The negotiations were thus neither "too early to be suspicious nor too late to be a waste of resources." In re Vitamins Antitrust Litig., 305 F.

Supp. 2d 100, 105 (D.D.C. 2004). And because of "significant informal discovery, . . . the parties were well-positioned to mediate their claims." Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 56 (D.D.C. 2010). The negotiations took place over nearly two years but came together "after a lengthy mediation session that was presided over by an experienced mediator," indicating skilled negotiating on both sides. See id. Further evidence that the negotiations were at arm's length and not collusive is provided by the positions taken by the parties during settlement negotiations and the compromises ultimately reached. See infra at 24.

The notice requirements of Rule 23 were also satisfied. When the Court preliminarily approved the settlement, it "direct[ed] notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1)(B); see Prelim. Approval ¶¶ 15, 16, 18. The Court also found the planned notice to be "the best notice practicable under the circumstances," Prelim. Approval ¶ 21, as was required for the individuals and entities who were not part of the originally certified class. See FED. R. CIV. P. 23(c)(2)(B). The claims administrator adequately executed this notice. Using the government's PACER registration data, it identified over 500,000 potential class members and sent them court-approved notices, both through email and through postcards. KCC Decl. ¶¶ 5-7, 8-11; see Prelim. Approval ¶ 13; see also FED. R. CIV. P. 23(c)(2)(B) (requiring, for new class members, "individual notice to all members who can be identified through reasonable effort"). The claims administrator also issued publication notice. KCC Decl. ¶¶ 12, 13. Each form of notice directed class members to additional information on the dedicated settlement website. See id. Exs. A-H. While there were a few errors in the notice process – the initial notice omitted some class members and gave some class members incorrect information – the claims administrator promptly corrected these errors and gave recipients sufficient time to opt out or object.

Id. ¶¶ 15-18.[6] The notice also satisfied Rule 23's substantive requirements for new class members. The emails, postcards, and publications, along with the dedicated settlement website:

> clearly and concisely state[d] in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

See FED. R. CIV. P. 23(c)(2)(B). The Court finds that this notice was more than sufficient and was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Haggart v. Woodley, 809 F.3d 1336, 1348-49 (Fed. Cir. 2016) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)).

After class members were given notice, they had over a month (and most had over two months) to file written objections. See KCC Decl. ¶¶ 10, 15; Prelim. Approval ¶¶ 3, 20. Objections could be filed by mailing or emailing Class Counsel and the Court. See Sett. Web Notice at 5. Only five individuals filed written objections. On October 12, 2023, the Court held the Settlement Hearing. After the parties' opening statements, the Court heard objections to the settlement. No one spoke who had not already submitted a written objection. Then, the Court gave the parties an opportunity to respond to objections. Finally, the Court heard from the parties and from objectors on the issue of attorney's fees.

---

[6] Objector Don Kozich contends that he did not receive notice of the settlement. Kozich Obj. and Mot. at 2. While no method of notice is perfect, Mr. Kozich's failure to receive notice was likely proper. Mr. Kozich does not appear to be a member of the class. He incurred PACER fees during the Class Period, but he did not pay those fees during the Class Period, and thus is ineligible for relief. Resp. to Kozich Obj. at 1.

Objector Eric Isaacson has questioned a few procedural aspects of the Settlement Hearing. First, he argues that discussing the proper award of attorney's fees after the time scheduled for objectors to speak deprives objectors of due process and runs afoul of the Federal Rules, Isaacson Stmt. at 7, which instruct the Court to consider "the terms of any proposed award of attorney's fees" in evaluating the adequacy of "the relief provided for the class" in the proposed settlement. FED. R. CIV. P. 23(e)(2)(C)(iii). Second, Mr. Isaacson argues that objectors at the hearing should have been given the opportunity to cross-examine declarants who provided support for Class Counsel's requested fees. Isaacson Stmt. at 7.[7]

Both of these arguments overstate an objector's role in the class settlement process. While the Court must consider – and has considered – the arguments of any class member who objects to the settlement, the Court need not give objectors the opportunity to speak at every possible point in the hearing; nor does the Court need to give objectors the opportunity to probe declarations or exhibits through cross-examination or other means. See 4 RUBENSTEIN, supra, § 13:42. Moreover, to assuage Mr. Isaacson's concerns, the Court allowed him to speak during the portion of the hearing addressing attorney's fees, in addition to his opportunity to speak during the portion of the hearing during which the reasonableness of the settlement was discussed.

[7] Mr. Isaacson further objects that "the settling parties arranged with the court to keep class members' objections off the public record." Isaacson Stmt. at 3. This objection has no factual basis. Though the objections the Court received through email were not automatically docketed, they were available upon request. In fact, at Mr. Isaacson's request, Class Counsel filed all objections to the public docket. See Compiled Objs.

B. Substantive Fairness

In considering a proposed class action settlement, the Court must compare the benefits afforded to class members under the settlement with the likely recovery that plaintiffs would have realized if they pursued the resolution of their claims through litigation in court. Thomas v. Albright, 139 F.3d at 231; see In re Black Farmers Discrimination Litig., 856 F. Supp. 2d at 30. The Court must look at the settlement as a whole and should not reject a settlement merely because individual class members claim that they would have received more by litigating rather than settling. Thomas v. Albright, 139 F.3d at 231. The Court should scrutinize the terms of the settlement carefully, but should also keep in mind "the interest in encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources." Christensen v. United States, 65 Fed. Cl. 625, 629 (2005) (quoting Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993)). And "the opinion of 'experienced and informed counsel should be afforded substantial consideration by [the C]ourt in evaluating the reasonableness of a proposed settlement.'" Prince v. Aramark Corp., 257 F. Supp. 3d 20, 26 (D.D.C. 2017) (quoting In re Lorazepam & Clorazepate Antitrust Litig., Civil Action No. 99-0790, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003)).

In its analysis of the Agreement's substantive fairness, the Court is guided by the substantive factors enumerated in the Federal Rules of Civil Procedure: whether "the relief provided for the class is adequate, taking into account" various subfactors, and whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2).

1. Whether the Relief is Adequate

The relief the settlement provides to class members is substantial. The majority of class members will receive a full refund for the PACER fees they paid during the Class

Period. Gupta Decl. ¶ 43. Although the minority of class members – those who paid over $350 in fees during the Class Period – will likely not receive a full refund, they may receive substantially more than $350. See Sett. Agreement ¶ 19. In addition, the "proposed method of distributing relief to the class" is efficient. See FED. R. CIV. P. 23(e)(2)(C)(ii). There are no claims to process, and class members will receive the relief even if they have never contacted Class Counsel or the claims administrator. See Pls.' Sett. Mot. at 13.

Contrast this substantial relief with the potential "costs, risks, and delay of trial and appeal." See FED. R. CIV. P. 23(e)(2)(C)(i). The Federal Circuit's liability ruling in this case found some, but not all, of the PACER fees collected during the Class Period to be unlawful. Federal Circuit Op., 968 F.3d at 1350-51, 1357. It left open the question of the extent to which it was lawful for the judiciary to fund CM/ECF through PACER fees. See id. at 1358. And the ruling effectively set the maximum possible recoverable damages for the class at around $500 million. Fitzpatrick Decl. ¶ 20.

Even putting aside the costs of trial and potential further appeal, the path to obtaining this $500 million would have been anything but smooth. "[T]here are several reasons to think a full recovery is unrealistic." In re APA Assessment Fee Litig., 311 F.R.D. 8, 19 (D.D.C. 2015). After the Federal Circuit's ruling, the government continued to assert that the class had no claim to damages because class members could not prove that – but for the unlawful expenditures – PACER fees would have been lower. Gupta Decl. ¶ 23. Moreover, even if class members would not have had to prove damages with specificity, the amount of potentially recoverable damages still would have been uncertain. Much of the potential recovery came from fees the judiciary used to pay for CM/ECF services, Fitzpatrick Decl. ¶ 20, and the Federal Circuit explicitly declined to rule on how much of these services were appropriately funded

through PACER fees. Federal Circuit Op., 968 F.3d at 1358. The recoverability of a sizable portion of the potential damages was thus an open question at the time of settlement.

In other words, at the point of the litigation at which the parties agreed on the terms of their settlement, it would have been a substantial risk to class members to proceed to trial. Evidence could have shown that all of the judiciary's CM/ECF expenditures were lawful. Or the government could have convinced the Court of its position on damages. In that case, the Named Plaintiffs would have faced the difficult task of proving that the judiciary would have chosen to charge lower PACER fees had its expenditures been limited to the lawful categories. The common fund amount – roughly a quarter of the potential recovery if every legal and factual issue had gone the plaintiffs' way – was impressively large in comparison to the risks of continuing to litigate.

Some objectors see a quarter of the maximum potential recovery as an unimpressive figure. See Isaacson Obj. at 3 (calling the settlement "remarkably mediocre"); Greenspan Obj. at 1 (asserting that the settlement should have fully reimbursed PACER users). These views do not properly account for the formidable arguments that were available to the government if the case had proceeded to trial. In addition, Objector Aaron Greenspan asserts that the common fund amount is too low because the judiciary can only legally charge for the marginal cost of document transmission, and that marginal cost is zero. Greenspan Obj. at 1. But the Court has explicitly rejected an interpretation of the E-Government Act that would limit lawful fees to those necessary to pay the marginal cost of operating PACER. Summary Judgment Op., 291 F. Supp. 3d at 140-43. Instead, the judiciary can use PACER fees to fund the full cost of providing public access to federal court electronic docketing information, including fixed costs. See Federal Circuit Op., 968 F.3d at 1349-52.

Other objectors argue that the Agreement is unreasonable because of its provision regarding attorney's fees, expenses, and service awards. See Isaacson Obj. at 9-17; Greenspan Obj. at 1-2. The Court has conducted a full analysis of the proper fee awards below. See infra Section IV. For now, it suffices to say that the fees provision of the Agreement is reasonable. See FED. R. CIV. P. 23(e)(2)(C)(iii) (instructing courts to consider the provisions of settlement agreements that relate to attorney's fees). The Agreement does not fix an amount of attorney's fees or service awards. Instead, it sets an upper limit on both – Class Counsel was able to request up to 20% of the common fund for attorney's fees, expenses, and service awards, including no more than $10,000 per service award for each class representative. Sett. Agreement ¶ 28. The Agreement leaves to the Court the ultimate determinations of how much to award. Id. Rather than setting an unreasonably high amount of attorney's fees or service awards, the Agreement thus caps the amount the Court has the opportunity to approve as reasonable.

Finally, the relative paucity of objections to the Agreement is a strong indicator of the adequacy of the relief. See In re Black Farmers Discrimination Litig., 856 F. Supp. 2d at 29; Mercier v. United States, 156 Fed. Cl. at 597. As Class Counsel notes, the settlement class is comprised of hundreds of thousands of PACER users and is "perhaps the most litigious group of people and entities ever assembled in a single class action, . . . including sophisticated data aggregators, federal-court litigators, and law firms of every stripe." Pls.' Reply at 1. Of this group, only thirty-three opted out of the class, and only five have objected to the settlement. In light of the terms of the Agreement and class members' lack of opposition to them, the Court finds the settlement relief adequate.

2. Whether the Settlement Treats Class Members Equitably

The Court concludes that the Agreement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). While it treats those who paid $350 or less in PACER fees during the Class Period differently from those who paid more than $350, this difference in treatment is fair and justified.

The requirement of intra-class equity exists to ensure that "class counsel ha[s not] sold out some of the class members at the expense of others, or for their own benefit." 4 RUBENSTEIN, supra, § 13:56. If class counsel prioritizes settling a case over vigorously advocating for all class members' claims, counsel may agree to provide some (more powerful or more vocal) class members more relief than they deserve while giving other class members less than they deserve. To ensure that class counsel has not done so, it falls upon the Court to determine whether similarly situated class members are treated similarly and whether "dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." Id.

There is absolutely no indication that Class Counsel "sold out" any group of class members in this case. The Agreement strikes a balance between two competing goals: First, to give relief to small-scale PACER users – the non-lawyer members of the public and individual law practitioners who were most affected by having to pay unlawful fees; the full reimbursement of all PACER fees paid up to $350 makes it more likely that small-scale users will be wholly compensated. See Sett. Agreement ¶ 20. And second, to treat all class members – including large-scale users like law firms – equitably based on what they actually paid. The pro rata allocation above $350 makes it more likely that the sizable fees paid by large-scale users will be adequately accounted for. See id. The Agreement thus does a good job of treating similarly

situated class members similarly, while accounting for the differences between dissimilarly situated class members.

The details the parties have provided about the settlement negotiations further support the reasonableness of the Agreement's common fund distribution. As to the allocation of settlement funds, the Named Plaintiffs initially took the position that the fund should be distributed on an exclusively pro rata basis. Gupta Decl. ¶ 28. The government countered that, before the pro rata allocation, class members should first be fully reimbursed up to a large amount. Id. It grounded this position in the E-Government Act's authorization to "'distinguish between classes of persons' in setting PACER fees . . . 'to avoid unreasonable burdens and to promote public access to'" electronic docketing information. Id. (quoting 28 U.S.C. § 1913 note). Consistent with the judiciary's policy of offering waivers and other pricing mechanisms to make PACER cheaper for some groups of users, the government wanted more of the settlement fund to go to reimbursing those who used PACER less. See id. The $350 figure reflected a compromise between the Named Plaintiffs' position and the government's position. Far from "selling out" class members, the different treatment of different groups within the class reflects vigorous negotiation on both sides, and reflects the text of the E-Government Act.

A number of the objectors dispute the reasonableness of the distribution. Mr. Isaacson argues that too much of the common fund is allocated pro rata, unfairly favoring large-scale users over small-scale users. Isaacson Obj. at 4-5. Objector Geoffrey Miller argues that too much of the common fund is allocated to fully reimbursing users who paid $350 or less, unfairly favoring small-scale users over large-scale users. Miller Obj. at 1-2.[8] As Class Counsel

[8] Mr. Miller also objects that "[t]he proposed plan of allocation under Federal Rule 23 is in tension with the Rules Enabling Act, 28 U.S.C. §[§] 2071-2077, because, by providing different treatment to litigants with identical legal claims, it arguably abridges their

points out, these arguments cannot both be correct, and the fact that each of them was made indicates, if anything, a good compromise. See Pls.' Reply at 4. Moreover, the structure of the distribution is on sound legal footing. "Neither the Federal Rules of Civil Procedure nor the Supreme Court requires that settlements offer a pro rata distribution to class members . . . ." Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 629 (6th Cir. 2007). At the same time, courts routinely approve settlements providing for pro rata distributions of common funds because such distributions directly account for the differences in the value of the claims of different class members. See, e.g., In re APA Assessment Fee Litig., 311 F.R.D. at 13; In re Facebook Biometric Info. Priv. Litig., 522 F. Supp. 3d 617, 629 (N.D. Cal. 2021); In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 580-81 (S.D.N.Y. 2008).

The fact that two objectors (Mr. Isaacson and Mr. Miller) hold these contradictory positions is understandable. A class member who paid substantially more than $350 in PACER fees, but substantially less than a large-scale user, may look at large-scale users and feel disappointed that these users are getting so much more in absolute dollars. And a large-scale user may look at a class member who paid $350 or less in PACER fees and find it unfair that that class member is getting fully reimbursed by the Agreement, while the large-scale user is not. At bottom, however, this dissatisfaction arises from the amount of the common fund, not its allocation. There is simply not enough money in the common fund to reimburse every class member for all of what they paid in PACER fees – nor should there be, as some of the fees were

---

right to be treated equally before the law." Miller Obj. at 2. But the Rules Enabling Act is irrelevant to allocations between class members in common-fund settlements. Instead, as applied to class actions, the Rules Enabling Act prevents courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458 (2016).

lawful. No settlement is perfect. But the Court finds that the difference in how this settlement treats different class members is justified, fair, and equitable.

Mr. Isaacson raises another issue of equity. He points out that many of the institutional class members are law firms, and that these firms have likely already been reimbursed – by their clients or through settlement agreements in other cases – for PACER fees paid during the Class Period. Isaacson Obj. at 4-7. Because these law firms have already been reimbursed, he argues, it is inequitable to treat them like other class members, particularly like individuals who never received reimbursement. See id. at 4.[9]

This argument makes some sense in the abstract. While a reasonable settlement hypothetically could differentiate between law firm class members who had been reimbursed for their PACER fees and other class members who had not been reimbursed for their PACER fees, there were good reasons not to do so here. First, prior to settlement, the claims of the law firms that had been reimbursed by their clients were just as valid as the claims of other class members. See S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918). In fact, the law firm class members were likely the only plaintiffs who could have brought claims against the government to recover the relevant PACER fees. Their clients could not have brought such claims because damages under the Little Tucker Act are available only to those who paid unlawful fees to the government, to those who paid unlawful fees to others "at the direction of

[9] Mr. Isaacson further argues that the common fund allocations to many large-scale claimants are improper because entities whose aggregated claims total over $10,000 fall outside of Little Tucker Act jurisdiction. Isaacson Obj. at 7-8. This argument misunderstands the law. "A suit in district court under the Little Tucker Act may seek over $10,000 in total monetary relief, as long as the right to compensation arises from separate transactions for which the claims do not individually exceed $10,000." Class Certification Op., 235 F. Supp. 3d at 38 (citing Am. Airlines, Inc. v. Austin, 778 F. Supp. 72, 76-77 (D.D.C. 1991); Alaska Airlines v. Austin, 801 F. Supp. 760, 762 (D.D.C. 1992); United States v. Louisville & Nashville R.R. Co., 221 F.2d 698, 701 (6th Cir. 1955)).

the government to meet a governmental obligation," see Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996), or to those against whom the government took action, related to unlawful fees, that had a "direct and substantial impact." See Ontario Power Generation, Inc. v. United States, 369 F.3d 1298, 1303 (Fed. Cir. 2004) (quoting Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1361 (Fed. Cir. 2002)). Because clients who reimbursed law firms for unlawful PACER fees do not appear to fit into any of these categories, it would have been difficult – perhaps impossible – for them to recover anything from the government. Instead, once law firm class members have received their distributions under the Agreement, clients may have claims against them – to recover what the clients paid to the law firms in PACER fees – through sources of law unrelated to class actions, like contract law or state statutes. See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 967 (N.D. Ill. 2011) (approving a settlement even though some class members had been reimbursed for unlawful fees). That is between lawyers and their clients and beyond the scope of this litigation.

Second, it makes sense to leave disputes concerning reimbursement to law firm class members and the clients who reimbursed them, rather than to the claims administrator. It is true, as Mr. Isaacson points out, that law firms often bill clients for PACER fees. Isaacson Obj. at 4; see, e.g., Decastro v. City of New York, Civil Action No. 16-3850, 2017 WL 4386372, at *10 (S.D.N.Y. Sept. 30, 2017). But it would be complicated and burdensome for the claims administrator to sort through billing records to determine what happened with respect to each set of PACER fees billed. Sometimes, firms write fees off. Sometimes, clients do not pay. And if a client paid part, but not all, of their bills, it may not even be possible for the claims administrator to figure out what portion of a client's payment went towards PACER charges. On the other

hand, law firm class members are better equipped to determine which of their clients to reimburse for PACER charges, and by how much. If the clients believe the firms to be unlawfully withholding reimbursement, they can sue. More likely, law firms and clients will resolve any disputes over reimbursement out of court. Allowing this process to play out does not make the settlement inequitable.

In short, the benefits offered to class members by the Agreement are substantial, and the likely outcome for the class if the case were to proceed to trial is uncertain. The Court is convinced that the Agreement is fair, reasonable, and adequate.

IV. ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). Here, the Agreement authorizes attorney's fees, costs, and services awards, but limits the amount the Court can award for these categories combined to no more than 20% of the common fund, or $25 million. Sett. Agreement ¶ 28. The Agreement further specifies that service awards cannot exceed $10,000 per Named Plaintiff. Id.

Class Counsel effectively requests the maximum amount allowed by the settlement: $1,106,654.98 in costs, $30,000 in service awards ($10,000 for each of the three Named Plaintiffs), and $23,863,345.02 – the difference between the $25 million cap and the

other two amounts – in attorney's fees. Pls.' Sett. Mot. at 4.[10] The government does not oppose their request.[11]

The Court must independently determine the reasonableness of the requested fees, costs, and service awards. After carefully considering the submissions of the parties, the relevant Federal Rule, and the case law, and after considering all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court awards the full amount requested by Class Counsel in fees, costs, and service awards.

A. Legal Background

1. Attorney's Fees

"The 'common fund doctrine' allows an attorney whose efforts created, increased or preserved a fund 'to recover from the fund the costs of his litigation, including attorneys' fees.'" In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 16 (D.D.C. 2003) (quoting Vincent v. Hughes Air West, Inc., 557 F.2d 759, 769 (9th Cir.1977)). In common-fund cases, courts have a duty to "ensure that claims for attorneys' fees are reasonable, in light of the results obtained." Rogers v. Lumina Solar, Inc., Civil Action No. 18-2128, 2020 WL 3402360, at *11 (D.D.C. June 19, 2020) (K.B. Jackson, J.) (quoting In re Black Farmers Discrimination Litig., 953 F. Supp. 2d 82, 87 (D.D.C. 2013)). The Court's independent scrutiny of an award's reasonableness is particularly important in common-fund cases because "the conflict between a class and its

[10] The $1,106,654.98 that Class Counsel requests in costs is comprised of $29,654.98 in attorney expenses and $1,077,000 in settlement-administration and noticing costs. Pls.' Sett. Mot. at 4.

[11] In its briefs, the government raised concerns about the size of the requested fees. Def.'s Resp. at 4-7. At the Settlement Hearing, however, the government indicated that Class Counsel's reply brief had alleviated their concerns.

attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n, 3 F.3d 1568, 1573 (D.C. Cir. 1993) (quoting Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)). Thus, in common-fund cases, the court acts "as fiduciary for the beneficiaries" of the fund "because few, if any, of the action's beneficiaries actually are before the court at the time the fees are set" and because "there is no adversary process that can be relied upon in the setting of a reasonable fee." In re Dep't of Veterans Affs. (VA) Data Theft Litig., 653 F. Supp. 2d 58, 60 (D.D.C. 2009) (quoting Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 251 (1985)).

Courts have identified two approaches to calculating reasonable attorney's fees in common-fund cases. The first is the "percentage-of-the-fund method, through which 'a reasonable fee is based on a percentage of the fund bestowed on the class.'" Health Republic Ins. Co. v. United States, 58 F.4th 1365, 1371 (Fed. Cir. 2023) (quoting Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984)). The second is the lodestar method, "through which the court calculates the product of reasonable hours times a reasonable rate, and then adjusts that 'lodestar' result, if warranted, on the basis of such factors as the risk involved and the length of the proceedings." Id. (cleaned up).

While courts have discretion to use either method, fee awards in common-fund cases are "typically based on some percentage of the common fund." Moore v. United States, 63 Fed. Cl. 781, 786 (2005). The lodestar method, by contrast, generally is used in fee-shifting cases. Health Republic Ins. Co. v. United States, 58 F.4th at 1371. Many courts of appeals have expressed an explicit preference for using the percentage method in common-fund cases. 5 RUBENSTEIN, supra, § 15:64 & n.15; see, e.g., Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261,

1271 (D.C. Cir. 1993); see also In re Baan Co. Sec. Litig., 288 F. Supp. 2d at 17. This is because the percentage method "helps to align more closely the interests of the attorneys with the interests of the parties," Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area Transit Comm'n, 3 F.3d at 1573, by discouraging inflation of attorney hours and promoting "efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." Trombley v. Nat'l City Bank, 826 F. Supp. 2d 179, 205 (D.D.C. 2011) (quoting In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 383 (D.D.C. 2002)). The lodestar method, on the other hand, may give attorneys "an incentive to run up" "the number of hours they have billed," which could "prolong[] litigation unnecessarily and hence defer[] the class's compensation." 5 RUBENSTEIN, supra, § 15:65; see Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1268.

When using the percentage-of-the-fund method, the Federal Circuit has identified the following factors to consider:

> (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award.

Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (quoting Moore v. United States, 63 Fed. Cl. at 787). In addition, "as settlement amounts increase in magnitude, the percentage of fees awarded should decrease." Haggart v. United States, 116 Fed. Cl. 131, 147 (2014). This is because "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." Id. (alterations in original) (quoting In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 339 (3d Cir. 1998)).

Courts sometimes employ a "lodestar cross-check" when they use the percentage method. See 5 RUBENSTEIN, supra, § 15:85. In a lodestar cross-check, "the reasonableness of a potential percentage-of-the-fund fee is checked by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier, and when this implicit multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (cleaned up). While "the resulting multiplier need not fall within any pre-defined range, . . . courts must take care to explain how the application of a multiplier is justified by the facts of a particular case, . . . [and] must provide sufficient analysis and consideration of multipliers used in comparable cases to justify the award made." Id. at 1375 (cleaned up). That said, lodestar cross-checks "need entail neither mathematical precision nor bean-counting," as "district courts may rely on summaries submitted by the attorneys and need not review actual billing records." In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005). Although not required, the Federal Circuit has strongly suggested using a lodestar cross-check, "at least as a general matter." Health Republic Ins. Co. v. United States, 58 F.4th at 1374 n.2.

2. Costs and Service Awards

Rule 23 contemplates recovery of "nontaxable costs," FED. R. CIV. P. 23(h), the "reasonable expenses normally charged to a fee paying client." 5 RUBENSTEIN, supra, § 16:5; see Quimby v. United States, 107 Fed. Cl. 126, 135 (2012). And "[i]t is well settled that counsel who have created a common fund for the benefit of a class are entitled to be awarded for out-of-pocket costs reasonably incurred in creating the fund." Mercier v. United States, 156 Fed. Cl. at 593. Aside from being reasonable, such expenses must be adequately documented. 5 RUBENSTEIN, supra, § 16:10.

Service awards, also known as "incentive" or "case-contribution" awards, are distributions from the common fund to class representatives in recognition of their service to the class and their role in the litigation. See 5 RUBENSTEIN, supra, § 17:1. Service awards "recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions," Mercier v. United States, 156 Fed. Cl. at 589, and also compensate class representatives for expenses and work performed by in-house counsel. See In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. at 400. Service awards must be reasonable and proportionate to class representatives' role in the case. See 5 RUBENSTEIN, supra, § 17:13.

B. Reasonableness of Requested Attorney's Fees

Class Counsel and the government agree that the Court should use the percentage-of-the-fund method to assess the reasonableness of the requested fees. Pls.' Sett. Mot. at 27; Def.'s Resp. at 8-9. Mr. Isaacson argues that the Court should use the lodestar method and award fees not exceeding Class Counsel's lodestar. Isaacson Obj. at 9-10. He relies primarily on Supreme Court precedent discussing fee-shifting cases and on precedent predating Rule 23 and the modern class action lawsuit. Id. But as the D.C. Circuit has noted, "the latest guidance from the High Court counsels the use of a percentage-of-the-fund methodology." Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1268 (citing Blum v. Stenson, 465 U.S. at 900 n.16); see also In re Home Depot Inc., 931 F.3d 1065, 1085 (11th Cir. 2019) ("[T]he Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases."); In re BioScrip, Inc. Sec. Litig., 273 F. Supp. 3d 474, 479-89 (S.D.N.Y. 2017) (Nathan, J.) (rejecting similar arguments made by Mr. Isaacson). For these reasons, and because the percentage method promotes efficiency and ensures that class counsel is compensated primarily based on the result achieved, the Court will use the percentage method.

The government urges the Court to also employ a lodestar cross-check. Def.'s Resp. at 7. Class Counsel points out, rightly, that a lodestar cross-check is not required, but it stops short of arguing that the Court should refrain from doing one. Pls.' Sett. Mot. at 35; see id. at 36-37; Pls.' Reply at 10. The Court will add a lodestar cross-check to its percentage-method analysis to confirm that the fee awarded properly accounts for the effort Class Counsel expended to litigate the case. The Court will first analyze the percentage requested using each of the above-described Federal Circuit factors, and then will conduct a lodestar cross-check.

1. The Quality of Counsel

As the Court has stated before, "[t]here is no dispute about the competency of class counsel." Class Certification Op., 235 F. Supp. 3d at 43. Gupta Wessler is one of the nation's leading plaintiff and public interest appellate boutiques, and also has extensive experience in complex litigation against the federal government. See Gupta Decl. ¶¶ 46-48, 50-55, 59-61. Motley Rice is a leading class-action law firm. Id. ¶ 45. In dividing case responsibilities, each firm took charge of what it does best – Gupta Wessler led the briefing, argument, research, and legal analysis, and Motley Rice led the case management, discovery, and settlement administration. Id. These two firms have "thoroughly impress[ive] . . . qualifications" and class members undoubtedly "benefit[ted] from the wealth of experience" they brought to the case. Steele v. United States, Civil Action No. 14-2221, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015) (describing groups of attorneys including current members of Class Counsel).

2. The Complexity and Duration of the Litigation

The litigation was reasonably complex. As in most class actions, the litigation involved a motion to dismiss, disputes regarding class certification, and cross-motions for summary judgment. See Motion to Dismiss Op., 2016 WL 7076986; Class Certification Op., 235 F. Supp. 3d 32; Summary Judgment Op., 291 F. Supp. 3d 123. But unlike most class actions, this case required appellate argument both as to a novel theory of jurisdiction and as to the most important merits issue in the case. See Federal Circuit Op., 968 F.3d at 1343. After remand, Class Counsel engaged in lengthy settlement negotiation with the government. Gupta Decl. ¶¶ 23-28. And even after the parties reached an agreement, Class Counsel put significant effort into answering class members' questions. Gupta Supp. Decl. ¶¶ 2, 3. All told, Class Counsel worked on this case for nearly eight years. See Gupta Decl. ¶¶ 11, 12.

Mr. Isaacson asserts that this case was easy to litigate because it involved an issue of statutory construction that was ultimately settled by the Federal Circuit. Isaacson Obj. at 14. But this argument ignores the fact that it was Class Counsel's very efforts that caused the Federal Circuit to construe the statute in a way that would allow the class to recover. The unsettled interpretation of the E-Government Act at the outset of the litigation speaks to the complexity of the case, not against it.

3. The Risk of Nonrecovery

There was an exceptionally high risk of nonrecovery in this case. As one of the attorneys representing the class describes, before this lawsuit, "litigation against the federal judiciary was not seen as a realistic way to bring about reform of the PACER fee regime" – both because "the judiciary has statutory authority to charge at least some amount in fees" and because "the fees were still assumed to be beyond the reach of litigation." Gupta Decl. ¶ 7. He

points out correctly that the Administrative Procedure Act – which normally provides jurisdiction and a waiver of sovereign immunity for lawsuits against agencies – explicitly exempts the federal judiciary from its reach. See id.; 5 U.S.C. § 551(1)(B).

Even after Class Counsel identified their alternative and ultimately successful strategy of arguing that the Little Tucker Act provided the necessary jurisdiction and waiver of sovereign immunity, there was still a significant risk of nonrecovery for class members. To show illegal exaction under the Little Tucker Act, the Named Plaintiffs had to "demonstrate that the statute or provision causing the exaction itself provides, either expressly or by necessary implication, that the remedy for its violation entails a return of money unlawfully exacted." Federal Circuit Op., 968 F.3d at 1348 (internal quotation marks omitted) (quoting Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005)). But the E-Government Act, which Class Counsel argued caused the exaction, "nowhere explicitly requires payment of damages by the government for overcharging users." Id. Thus, before even getting to the merits, Class Counsel had to fight an uphill interpretive battle.

On the merits, Class Counsel's argument was similarly difficult. Take, for example, the one sentence in the E-Government Act that explicitly spoke to PACER fees: "The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts under those sections for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. As the Federal Circuit acknowledged, far from supporting its ultimate holding, this sentence "supports the government's interpretation, as it authorizes charging fees for electronic access to information without any express restrictions." Federal Circuit Op., 968 F.3d at 1351. Nevertheless, Class Counsel persuaded the Federal Circuit that the rest of the statute, and its context, imposed

restrictions on the sorts of electronic information dissemination for which the judiciary could use PACER fees. See id. at 1352-57.

Finally, there was litigation risk even after the Federal Circuit held that the E-Government Act did impose such restrictions. See supra Section III.B.1. Whether the judiciary could use PACER fees to pay for all of CM/ECF was still an open question. See Federal Circuit Op., 968 F.3d at 1358. And the government made plausible arguments that the class could not recover damages without an additional evidentiary showing. See Gupta Decl. ¶ 23. Until the moment the Named Plaintiffs reached a settlement with the government, there was a significant risk of nonrecovery.

4. The Fee that Likely Would Have Been Negotiated in Similar Cases

The Court is to consider what fee "likely would have been negotiated between private parties in similar cases." Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (quoting Moore v. United States, 63 Fed. Cl. at 787). The truth is that there are few "similar cases" with which to compare this case: a class action lawsuit against the federal judiciary for charging too much in fees that it is explicitly authorized to charge at least in part. See infra Section IV.B.6. Still, it is worth noting that the percentage award Class Counsel requests here is below the typical 33% contingency fee. And as Class Counsel points out, each Named Plaintiff signed a retainer agreement providing for a contingency fee of up to 33% of the common fund, Gupta Decl. ¶ 65, and each class member who was also part of the original class agreed to a contingency fee of up to 30% by declining to opt out. Class Cert. Email Notice; Class Cert. Web Notice at 7; see 1st Notice Appr. At the same time, the Court takes these agreements with a grain of salt. Each plaintiff in a class action "typically has a small interest in the overall controversy" and thus "has no incentive to negotiate a competitive rate with class counsel."

5 RUBENSTEIN, supra, § 15:74. And while one third of the recovery may be the typical fee in cases with relatively few plaintiffs, it is not the standard for large class actions where the size of the class is one of the main determinants of the size of the recovery. This factor thus has minimal bearing on the reasonableness of Class Counsel's requested fee. See Mercier v. United States 156 Fed. Cl. at 592 ("Even if some other class members had agreed to a 33.3% contingency fee, they almost certainly would have evaluated the fee's reasonableness in terms of their own recoveries, overlooking the economies of scale that class counsel enjoyed by representing thousands of similarly situated plaintiffs.").

5. Class Members' Objections to the Settlement Terms or Fees Requested by Class Counsel

Most of the objections to the Agreement or the requested fees have already been discussed in the context of the fairness of the settlement, see supra Section III, or with regard to another fee approval factor. See supra Section IV.B.2. Mr. Isaacson raises several additional arguments regarding attorney's fees. First, Mr. Isaacson argues that the Court should not consider the supplemental declarations of Professor William Rubenstein and Professor Brian Fitzpatrick because Class Counsel submitted these declarations after the deadline for class members to file objections. Isaacson Stmt. at 3. Second, Mr. Isaacson quibbles with the content of these supplemental declarations. Id. at 3-6.

Strictly construed, Mr. Isaacson's first argument lacks merit. Under the Federal Rules of Civil Procedure, the only relevant requirement is that notice of a motion for attorney's fees must be "directed to class members in a reasonable manner" so that class members "may object to the motion." FED. R. CIV. P. 23(h). The Advisory Committee notes that, "[i]n setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." Id. advisory committee's note (2003).

Rule 23 thus requires only that class members have sufficient time to respond to the fee motion and accompanying evidence, not to evidence submitted in response or reply. Here, Class Counsel submitted their motion for attorney's fees over two weeks before the objection deadline, giving objectors sufficient time to respond. See Pls.' Sett. Mot.

That said, it is a fair point that class members lack a meaningful opportunity to object to attorney's fees requests if counsel submits declarations raising new bases of support for the requested fees after the objection deadline. And the professors' supplemental declarations do just that. Professor Fitzpatrick's declaration provides information about why the Fitzpatrick Matrix should not be used as Mr. Isaacson suggests. See Fitzpatrick Supp. Decl. ¶¶ 4-6. Professor Rubenstein's declaration examines the data used in the Fitzpatrick Matrix and comes to certain conclusions about reasonable fees based on a subset of that data. See Rubenstein Supp. Decl. ¶¶ 13-26. Neither of these points was raised in the professors' original declarations, which accompanied Class Counsel's fees motion.

Based on Mr. Isaacson's objections, the Court will not rely on the supplemental declarations of Professor Fitzpatrick or Professor Rubenstein in assessing the reasonableness of Class Counsel's requested fees. Because the Court will not rely on the declarations, it need not address Mr. Isaacson's arguments about their content.

6. The Percentage Applied in Other Class Actions

Thirty years ago, the D.C. Circuit noted that "a majority of common fund class action fee awards fall between twenty and thirty percent." Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1272. This remains true today. See 5 RUBENSTEIN, supra, § 15:83 (summary of empirical studies on common fund fee awards finding means between 22% and 27% and medians between 24% and 29%). For cases in which the common fund is especially large, fee

awards tend towards the low end of this range. The latest comprehensive study on class action fee awards, using data from 2009-2013, reports that the mean percentage awarded from common funds greater than $67.5 million is 22.3%. Theodore Eisenberg et al., Attorneys' Fees in Class Actions: 2009-2013, 92 N.Y.U. L. REV. 937, 948 (2017).

Although it is difficult to locate good comparisons to the settlement in this case, the comparisons that the Court did find are in line with these statistics. Two cases involving insufficient pay by the Department of Veterans Affairs provide the closest analogues. In Quimby v. United States, a class of over 40,000 health professionals formerly employed by the Department alleged that they were deprived of additional pay that they earned for working undesirable shifts. Quimby v. United States, 107 Fed. Cl. at 128-29. As this Court has done in this case, the Court of Claims granted in part and denied in part cross-motions for summary judgment on the government's liability. Id. at 128. The class ultimately settled with the government in 2012 – after eleven years of contentious litigation – and the settlement agreement provided for a common fund of $74 million. See id. at 133. The Court of Claims granted class counsel's request for 30% of the common fund in attorney's fees, id. at 132, 135, reasoning that the attorneys obtained "excellent results," id. at 133 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)), and that "[t]he complexity of this litigation, the government's opposition to the Court's ruling on the merits, and the absence of controlling precedent concerning many of the issues presented together indicate that continued litigation would have created substantial uncertainty for members of the class." Id.

The plaintiffs in Mercier v. United States brought similar claims. See Mercier v. United States, 156 Fed. Cl. 580. There, a class of over 3,000 nurses and physician assistants sued the Department of Veterans Affairs, alleging that they were deprived of overtime pay. Id.

at 583. The Court of Claims granted the government's motion to dismiss, but was reversed on appeal. Id. The litigation continued. Id. The class settled with the government in 2021 – after eight years of litigation – and the settlement agreement provided for a common fund of $160 million. Id. at 583-84. Class counsel requested 30% of the common fund in attorney's fees. Id. at 590. In analyzing the reasonableness of this request, the Court of Claims found that class counsel was skilled and experienced, that the litigation was complex, and that the risk of nonrecovery was substantial. Id. at 591. But because the common fund was so large (in part due to the size of the class itself), the court rejected class counsel's request and awarded 20% of the fund instead of the requested 30%. Id. at 592-93. The court found that the awarded percentage would "protect[] the interests of the class members but also provide[] ample compensation to counsel for their excellent work in this case" and "encourage other counsel to take on the representation of plaintiffs in similar cases." Id. at 593.

Here, the requested percentage is 19.1%. It is smaller than the percentage the Court of Claims awarded in Quimby, a complex case that lasted longer than this one – and where, as here, the government opposed the court's rulings on novel issues of law. See Quimby v. United States, 107 Fed. Cl. at 128-133. It is approximately what the Court of Claims awarded in Mercier, another complex case, of similar duration to this one – and where, as here, counsel for the class successfully litigated issues of liability on appeal. See Mercier v. United States 156 Fed. Cl. at 583-84, 591-93. Furthermore, according to the most recent comprehensive study on class action fee awards, the requested percentage is around the average for common funds in the range of the fund created by this settlement. See Eisenberg et al., supra, at 948. Because the requested fee award fits neatly within the relevant statistical range and aligns with the best case analogues, this factor strongly counsels in favor of approval of the attorney's fees request.

7. The Size of the Award

The size of the requested fee award – nearly $24 million – is large. But "so is the class members' total recovery." See Raulerson v. United States, 108 Fed. Cl. 675, 680 (2013) (approving fee award of approximately $11 million). Three additional considerations convince the Court that the absolute size of the requested award is not a cause for concern. First, $24 million is nowhere near the highest amounts courts have awarded in attorney's fees in common-fund cases. See, e.g., 52 Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 723-24 (2d Cir. 2023) (affirming fee award of approximately $523 million); In re Equifax Inc. Customer Data Sec. Breach Litig., 999 F.3d 1247, 1281 (11th Cir. 2021) (affirming fee award of $77.5 million); see also Eisenberg et al., supra, at 943-44 (finding yearly average fee awards between $37.9 million and $124 million in common-fund cases with recoveries greater than $100 million). Second, $24 million is close to the absolute size of the fees awarded in the closest comparator cases identified above. See Mercier v. United States 156 Fed. Cl. at 593 (awarding $32 million in fees); Quimby v. United States, 107 Fed. Cl. at 135 (awarding approximately $22 million in fees). And third, the Court's lodestar cross-check, performed below, directly accounts for the size of the fee award by comparing it to the amount of effort that Class Counsel expended in this case. As a result, this factor does not move the needle in either direction.

8. Lodestar Cross-Check

The Federal Circuit has noted a "norm of . . . multipliers in the range of 1 to 4" in lodestar cross-checks of reasonable fee requests. Health Republic Ins. Co. v. United States, 58 F.4th at 1375. Statistics show that, between 2009 and 2013, the mean lodestar multiplier was 1.48. Eisenberg et al., supra, at 965 tbl.12. For cases with common funds over $67.5 million, the mean multiplier was 2.72. Id. at 967 tbl.13. Multipliers significantly above this

mean may be cause for concern. In Mercier, for example, the Court of Claims found a multiplier of 4.4 to be too high, but a multiplier of 2.95 to result in "a very generous but reasonable recovery." Mercier v. United States, 156 Fed. Cl. at 592; see also 5 RUBENSTEIN, supra, § 15:87 ("Empirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range; this fact counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean.").

Here, Class Counsel estimates their lodestar at $6,031,678.25 based on the hourly rates that the firms' attorneys charge in non-contingency cases. Gupta Decl. ¶¶ 63, 64; Oliver Decl. ¶¶ 12, 13. Both the government and Mr. Isaacson suggest that Class Counsel's lodestar should be estimated using the hourly rates in the U.S. Attorney's Office Fitzpatrick Matrix, instead of using Class Counsel's actual rates. Def.'s Resp. at 5-7; Isaacson Obj. at 12-13. But the Fitzpatrick Matrix was not designed to be used for lodestar cross-checks in common fund class actions; instead, "[t]he matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." U.S. ATT'Y'S OFF. FOR D.C., THE FITZPATRICK MATRIX, Explanatory Note 2, www.justice.gov/usao-dc/page/file/1504361/download [https://perma.cc/EVQ5-NNMC]; see, e.g., J.T. v. District of Columbia, 652 F. Supp. 3d 11, 26-27, 31-36 (D.D.C. 2023) (using Fitzpatrick Matrix to calculate reasonable attorney's fees under the fee-shifting provision of the Individuals with Disabilities Education Act). Mr. Isaacson also asserts that the Court should require Class Counsel to submit itemized records of hours billed in order to make "appropriate deductions." Isaacson Obj. at 12. But the Court declines to engage in the "bean-counting" that it has been cautioned against, and instead

will "rely on summaries submitted by the attorneys." In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306-07.[12]

In addition, the government argues that Class Counsel's use of current billing rates "fail[s] to account [for the fact] that the litigation began in 2016, with class certification in 2017, when rates for both firms presumably were lower." Def's Resp. at 4. But courts routinely use current billing rates for lodestar cross-checks, even when the attorneys requesting fees charged lower rates at the outset of litigation. See, e.g., Bakhtiar v. Info. Res., Inc., Civil Action No. 17-4559, 2021 WL 4472606, at *9 (N.D. Cal. Feb. 10, 2021); In re Apollo Grp. Inc. Sec. Litig., Civil Action No. 04-2147, 2012 WL 1378677, at *7 & n.2 (D. Ariz. Apr. 20, 2012). Until fees are awarded, class action attorneys work on a case without pay. Using current billing rates, which are almost always higher than historical rates, accounts for this delay in payment. See James v. District of Columbia, 302 F. Supp. 3d 213, 226-28 (D.D.C. 2018) (citing Perdue v. Kenny A. ex. rel. Winn, 559 U.S. 542, 556 (2010)); cf. Stetson v. Grissom, 821 F.3d 1157, 1166 (9th Cir. 2016) (when calculating attorney's fees using the lodestar method, rather than the percentage-of-the-fund method, in common-fund cases, "[t]he lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement").

Dividing Class Counsel's requested fees ($23,863,345.02) by their estimated lodestar ($6,031,678.25) results in a multiplier of 3.96. Put another way, Class Counsel's

[12] The Court agrees with the government, as it represented at the Settlement Hearing, that any concerns about Class Counsel's future time estimate included in their estimated lodestar have been addressed through Class Counsel's supplemental declarations. See Gupta Supp. Decl. ¶¶ 2-3; Oliver Supp. Decl. ¶¶ 3-5.

requested fee award would compensate them at slightly below four times their hourly rates for the work they performed in this case. This multiplier is within the normal range of one to four – although, admittedly, on the high end of it. The Court believes that a multiplier of this magnitude is warranted due to the risk Class Counsel took on in agreeing to litigate the case. Class Counsel provided exceptional service to the class for over seven years, all the while in danger of being paid nothing (or close to it). And multipliers of this size, or even higher, are by no means unheard of. See 5 RUBENSTEIN, supra, § 15:89 (noting "roughly 70 reported cases with multipliers over 4"); e.g., Kane Cnty., Utah v. United States, 145 Fed. Cl. 15, 20 (2019) (multiplier of 6.13 for attorney's fee award of approximately $6 million, one third of the common fund); Geneva Rock Prod., Inc. v. United States, 119 Fed. Cl. 581, 595 (2015) (multiplier of 5.39 for attorney's fee award of approximately $4 million, 17.5% of the common fund). After all, when counsel in a class action request a reasonable percentage of a common fund, the lodestar cross-check must remain a cross-check of that percentage, and no more. "[T]he point is not to identify the precise outdoor temperature at noon but to know whether or not a coat might be necessary when venturing out for lunch." 5 RUBENSTEIN, supra, § 15:87. Here, the temperature is just fine.

The Court will award the full amount of attorney's fees requested by Class Counsel. In addition to reflecting a reasonable lodestar multiplier, the fees requested reflect a percentage of the fund around the average for common funds of similar size – even though Class Counsel's representation, and the result they achieved for the class, were well above average. Class Counsel did an exceptional job in novel litigation with a high risk of nonrecovery. For these reasons, their fee request is warranted.

C. Expenses and Service Awards

Class Counsel requests $10,000 for each of the three Named Plaintiffs as service awards. Pls.' Sett. Mot. at 40-41. Mr. Isaacson objects that awards of this type are unlawful under nineteenth-century Supreme Court precedent. Isaacson Obj. at 14-15; see Trustees v. Greenough, 105 U.S. 527 (1882); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). The "overwhelming majority" of circuits disagree with Mr. Isaacson's interpretation of these cases. Moses v. N.Y. Times Co., 79 F.4th 235, 253 (2d Cir. 2023) (collecting cases). Mr. Isaacson urges the Court to adopt the reasoning of the Eleventh Circuit, the one outlier from this modern consensus. See Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255 (11th Cir. 2020). But even the Eleventh Circuit – and the Supreme Court cases on which Mr. Isaacson relies – acknowledges that "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation." Id. at 1257; see Trustees v. Greenough, 105 U.S. at 537; Cent. R.R. & Banking Co. v. Pettus, 113 U.S. at 122-23. And each Named Plaintiff in this case has expended over $10,000 worth of attorney time and expenses in leading this litigation. See Burbank Decl. ¶ 6; Rossman Decl. ¶ 3; Brooks Decl. ¶ 2. Thus, the Court finds the award to the Named Plaintiffs here appropriate. As one of the attorneys representing the class stated in his declaration:

> [E]xperienced in-house lawyers [for the Named Plaintiffs] performed invaluable work that was necessary to prosecute this case effectively and ethically. Had they not performed that work on the litigation, the same work would have had to be performed by class counsel or, perhaps more likely, by other outside counsel hired by each organization at far greater expense.

Gupta Supp. Decl. ¶ 7.

The Court also approves Class Counsel's request for $29,654.98 in attorney expenses and $1,077,000 in settlement administration costs. Pls.' Sett. Mot. at 40. As documented by Class Counsel, the attorney expense reimbursements requested include travel, food, lodging, court fees, Westlaw/Lexis fees, photocopying, printing, and mail services; they also include the plaintiffs' portion of the cost of mediation services. Oliver Decl. ¶¶ 14-18. The settlement administration amount was calculated based on the noticing expenses, as well as the "not-to-exceed" amount quoted by the settlement administrator. Id. ¶ 19; KCC Supp. Decl. ¶ 4. The Court finds these expenses and administration costs to be reasonable and adequately documented.

V. CONCLUSION

The Named Plaintiffs and the United States have reached an historic settlement agreement in this case that reimburses PACER users for $100 million of the fees they paid within a period of over eight years. The Agreement reimburses many small-scale PACER users for all of the fees they paid during this period. And it reimburses large-scale users substantially, and in proportion to what they paid. The Court finds the Agreement to be fair, reasonable, and adequate.

Before reaching a settlement in this unique case, Class Counsel impressively litigated for nearly eight years. They took the case from an untested idea, to a certified class action, to a win on partial summary judgment, to a successful appeal. They negotiated with the federal government to deliver to the class much of the recovery the class sought – although, as with any compromise, not all of it. The Court approves Class Counsel's full request for attorney's fees, costs, and service awards.

Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards [Dkt. No. 158] is hereby GRANTED. The Final Judgment and Order on Final Approval of Class Settlement, Attorney's Fees, Costs, and Service Awards will issue this same day.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 16-0745 (PLF)

FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS

This matter came before the Court on October 12, 2023 for a hearing pursuant to the Order of this Court, dated May 8, 2023, on the application of the Settling Parties for approval of the Settlement set forth in the Class Action Settlement Agreement, as amended. Due and adequate notice having been given to the Class as required in the Order, the Court having considered all papers filed and proceedings held herein, and for the reasons explained in this Court's Opinion issued today, and good cause having been shown, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement, unless otherwise stated herein.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including all members of the Class.

3. Excluded from the Class is any person who timely and validly sought exclusion from the Class, as identified in Exhibit 1 hereto.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement set forth in the Agreement, and finds that:

a. in light of the benefits to the Class and the complexity and expense of further litigation, the Settlement Agreement is, in all respects, fair, reasonable, and adequate and in the best interests of the Class;

b. there was no collusion in connection with the Settlement Agreement;

c. Class Representatives and Class Counsel had adequately represented the Class;

d. the Settlement Agreement was the product of informed, arm's-length negotiations among competent, able counsel;

e. the relief provided for the Class is adequate, having taken into account (i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the Class, including the use of billing data maintained by the Administrative Office of the U.S. Courts and the notification and dispute procedures on the class website; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Federal Rule of Civil Procedure 23(e)(3);

f. the Settlement Agreement treats Class Members equitably relative to each other; and

g. the record is sufficiently developed and complete to have enabled Class Representatives and Defendant to have adequately evaluated and considered their positions.

5. Accordingly, the Court authorizes and directs implementation and performance of all the terms and provisions of the Settlement Agreement, as well as the terms and provisions set forth in this Order. Except as to any individual claim of those persons who have validly and

timely requested exclusion from the Class, the Litigation and all claims alleged therein are dismissed with prejudice as to the Class Representatives, and the other Class Members, as defined in the Settlement Agreement.

6. No person shall have any claim against the Class Representatives, Class Counsel, or the Claims Administrator, or any other person designated by Class Counsel, based on determinations or distributions made substantially in accordance with the Settlement Agreement or order of this Court.

7. Upon release of the Aggregate Amount of $125,000,000 from the U.S. Department of the Treasury's Judgment Fund, the Class Representatives, and each of the Class Members not timely and validly excluded, shall be deemed to have and by operation of this Judgment shall have, fully, finally, and forever waived, released, discharged, and dismissed as to the United States, its political subdivisions, its officers, agents, and employees, including in their official and individual capacities, any and all claims, known or unknown, that were brought or could have been brought against the United States for purported overcharges of any kind arising from their use of PACER during the Class Period, with prejudice on the merits, whether or not the Class Representatives, or each of the Class Members ever obtains any distribution from the Settlement Fund. Claims to enforce the terms of the Stipulation and the Agreement are not released.

8. The distribution and publication of notice of the settlement as provided for in this Court's Order of May 8, 2023, constituted the best notice practicable under the circumstances, including individual notice to Class Members in the data maintained by the Administrative Office of the U.S. Courts. This notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and due process. No Class Member is relieved from the terms of the Settlement

Agreement, including the releases provided for, based on the contention or proof that such Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Class Members to object to the proposed Settlement and to participate in the approval hearing. It is hereby determined that all members of the Class are bound by this Judgment, except those persons listed in Exhibit 1 to this Judgment.

9. Any order entered regarding any fee and expense application, any appeal from any such order, or any reversal or modification of any such order shall not affect or delay the finality of the Final Judgment in this litigation.

10. Neither the Settlement Agreement, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any released claim, or of any wrongdoing or liability of the United States; or (b) is or may be deemed to be or may be used as an admission or evidence that any claims asserted by plaintiffs were not valid or that the amount recoverable would not have exceeded the Aggregate Amount of $125,000,000 in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal. The United States may file the Settlement Agreement or this Judgment in any other action that may be brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. The United States shall pay $125,000,000 into the PACER Class Action Settlement Trust upon the expiration of the period to appeal from this Order.

12. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the Settlement and any award or

distribution from the Aggregate Amount paid by the United States in settlement of this litigation; (b) disposition of the PACER Class Action Settlement Trust; (c) hearing and determining any fee and expense application; and (d) all parties hereto for the purpose of construing, enforcing and administering the Settlement.

13. The Court finds that during the course of the Litigation, plaintiffs and the United States, and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

14. In the event that the settlement does not become effective in accordance with the terms of the Settlement Agreement, then this Judgment shall be rendered null and void and shall be vacated; and in such event, all orders entered and releases delivered in connection with this Order and Final Judgment shall be null and void and shall be vacated, and the parties shall revert to their respective positions in the Litigation as of July 12, 2022.

15. Plaintiffs ask that the Court grant their request for 20% of the settlement fund to cover attorney's fees, notice and settlement costs, litigation expenses, and service awards. That request is granted. Specifically, the Court hereby (1) awards $10,000 to each class representative, (2) awards $29,654.98 to class counsel to reimburse litigation expenses, (3) orders that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) awards the remaining amount ($23,863,345.02) to class counsel as attorney's fees.

16. Upon consideration of this submission and the entire record before the Court, and for the reasons stated in the Opinion issued this same day, the Court finds that the attorney's fees, costs and expenses, and service awards, as agreed by the parties, are fair and reasonable pursuant to paragraph VI(A) of the Settlement Agreement and Federal Rule of Civil Procedure 23(e)(2)(C)(iii), (h).

17. The parties are hereby authorized, without further approval of the Court, to unanimously agree to and adopt in writing amendments, modifications, and expansions of the Settlement Agreement, provided that such amendments, modifications, and expansions of the Settlement Agreement are not materially inconsistent with this Judgment, and do not materially limit the rights of the Members of the Class under the Settlement Agreement.

18. Without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

19. The Court directs immediate entry of this Judgment by the Clerk of the Court.

20. The Court's orders entered during this litigation relating to the confidentiality of information shall survive the settlement and resolution and dismissal of this litigation.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

EXHIBIT 1

ClaimID	Year First Notice Sent
10034328-7	2023
10035184-0	2023
10037459-0	2023
10040932-6	2023
10041843-0	2023
10049120-0	2023
10049953-8	2023
10061501-5	2023
10065649-8	2023
10066366-4	2023
10083140-0	2023
10084333-6	2023
10085991-7	2023
10095277-1	2023
10113350-2	2023
10116080-1	2023
10118614-2	2023
10132009-4	2023
10133913-5	2023
10141727-6	2023
10147158-0	2023
10152565-6	2023
10173016-0	2023
10176126-0	2023
10182150-6	2023
10185685-7	2023
10189089-3	2023
10192998-6	2023
10196979-1	2023
10197284-9	2023
10203395-1	2023
10016846-9	2023
10052120-7	2023
10133913-5	2023
10000447701	2017
10000707701	2017
10002821401	2017
10005011601	2017
10005499701	2017
10005664701	2017
10006372001	2017
10007313001	2017
10008363801	2017
10008769301	2017
10008798001	2017
10009012601	2017

10009273101	2017
10010171901	2017
10010221901	2017
10011076901	2017
10011551201	2017
10012220601	2017
10012456201	2017
10013915201	2017
10014611901	2017
10015286701	2017
10016324501	2017
10017909501	2017
10018775401	2017
10018943001	2017
10020415601	2017
10023376401	2017
10026066401	2017
10026930801	2017
10028461901	2017
10028932001	2017
10029603801	2017
10029844801	2017
10032537301	2017
10032704701	2017
10033616401	2017
10035469501	2017
10036014201	2017
10036567001	2017
10037093701	2017
10039315901	2017
10040300101	2017
10041710301	2017
10042162301	2017
10042250001	2017
10043184701	2017
10043617101	2017
10044286901	2017
10044493301	2017
10045532301	2017
10046948601	2017
10048740301	2017
10050286601	2017
10050994001	2017
10053464801	2017
10054856801	2017
10054968801	2017
10057104901	2017

10058481001	2017
10060415801	2017
10063799101	2017
10063923901	2017
10064479001	2017
10064600101	2017
10065803901	2017
10066151801	2017
10067057001	2017
10067820801	2017
10069992301	2017
10071549701	2017
10071662301	2017
10071925901	2017
10072056001	2017
10072482601	2017
10073102801	2017
10075224001	2017
10075273101	2017
10075352801	2017
10075769801	2017
10077286901	2017
10077932301	2017
10077997901	2017
10078550501	2017
10080612001	2017
10081622801	2017
10082241101	2017
10083173401	2017
10084766301	2017
10085064901	2017
10085996301	2017
10086464801	2017
10087257801	2017
10087762001	2017
10089389201	2017
10089507401	2017
10090051301	2017
10090174801	2017
10090236401	2017
10090480401	2017
10091442101	2017
10092739701	2017
10093180701	2017
10095383901	2017
10095879501	2017
10096283001	2017

10096482501	2017
10096522201	2017
10097267601	2017
10100271301	2017
10100599401	2017
10101080101	2017
10101868001	2017
10101941501	2017
10102590701	2017
10103010101	2017
10105763501	2017
10105855001	2017
10107851101	2017
10108906501	2017
10111320101	2017
10112826501	2017
10114817301	2017
10115231001	2017
10115433101	2017
10116343501	2017
10117151101	2017
10118423201	2017
10118950301	2017
10119125001	2017
10119759701	2017
10121185501	2017
10121819901	2017
10122205101	2017
10122629901	2017
10123395401	2017
10124592001	2017
10125315101	2017
10125364301	2017
10126285101	2017
10126752601	2017
10126762901	2017
10127924301	2017
10129225901	2017
10131063801	2017
10133388201	2017
10133687101	2017
10133958601	2017
10134825301	2017
10134968301	2017
10135144601	2017
10135756401	2017
10136099001	2017

10136855001	2017
10137251601	2017
10137528101	2017
10137903101	2017
10139299001	2017
10140073101	2017
10140505401	2017
10140555801	2017
10141339701	2017
10141594101	2017
10141736601	2017
10143024301	2017
10143222701	2017
10143236701	2017
10143458301	2017
10145173801	2017
10147350301	2017
10149014801	2017
10149717901	2017
10149718001	2017
10152536901	2017
10152625801	2017
10153428001	2017
10153618501	2017
10153754201	2017
10153756601	2017
10153779701	2017
10156471501	2017
10157012001	2017
10157124001	2017
10158021601	2017
10158209201	2017
10158298501	2017
10158888401	2017
10159890701	2017
10159891901	2017
10160015001	2017
10160315001	2017
10161686701	2017
10161894301	2017
10161898001	2017
10161944301	2017
10162799301	2017
10163708101	2017
10164776101	2017
10165562901	2017
10167227501	2017

10171950401	2017
10174000101	2017
10174868101	2017
10175374301	2017
10175548001	2017
10176373601	2017
10176919201	2017
10177057101	2017
10177956201	2017
10178536701	2017
10178913001	2017
10182011201	2017
10182792101	2017
10185798601	2017
10185857701	2017
10185858901	2017
10185874701	2017
10186179501	2017
10188095901	2017
10188321301	2017
10188669001	2017
10190279701	2017
10190402201	2017
10190457501	2017
10190550601	2017
10190625001	2017
10191926801	2017
10192316801	2017
10192357001	2017
10192847601	2017
10192879801	2017
10192963801	2017
10194141901	2017
10197285401	2017
10199679201	2017
10199890901	2017
10204292501	2017
10205252901	2017
10205690001	2017
10206206701	2017
10207278401	2017
10207584001	2017
10207639001	2017
10207782401	2017
10207896801	2017
10208191801	2017
10208513401	2017

10209552801	2017
10209592901	2017
10209627201	2017
10209638701	2017
10210263601	2017
10210694001	2017
10210945001	2017
10212706201	2017
10212823601	2017
10213182001	2017
10214228201	2017
10214823501	2017
10214922701	2017
10216477001	2017
10217089701	2017
10217396501	2017
10219369101	2017
10219889501	2017
10221713001	2017
10221823701	2017
10222565501	2017
10222645301	2017
10223006701	2017
10224013901	2017
10225094701	2017
10225657301	2017
10225834001	2017
10226300001	2017
10227002801	2017
10229283801	2017
10229428801	2017
10229838501	2017
10230357501	2017
10231975301	2017
10232606001	2017
10234539901	2017
10234608201	2017
10235129601	2017
10236098401	2017
10236449701	2017
10237057601	2017
10237680301	2017
10237912901	2017
10238284001	2017
10238489701	2017
10240243701	2017
10240374001	2017

10240773301	2017
10241983801	2017
10242752501	2017
10243338001	2017
10243778601	2017
10244498501	2017
10245781501	2017
10247787501	2017
10248160001	2017
10248356501	2017
10249090901	2017
10252117701	2017
10252888301	2017
10253744601	2017
10253873601	2017
10254792001	2017
10254933301	2017
10255719601	2017
10255720201	2017
10256855801	2017
10258835101	2017
10259957901	2017
10260649301	2017
10260794101	2017
10261595001	2017
10261762401	2017
10261872001	2017
10261931101	2017
10264115801	2017
10264948001	2017
10266425001	2017
10266442001	2017
10267627601	2017
10268262801	2017
10270268801	2017
10270866601	2017
10270975001	2017
10271070301	2017
10272628001	2017
10275055501	2017
10275578401	2017
10275752501	2017
10276905901	2017
10276939401	2017
10278126601	2017
10279936201	2017
10280532501	2017

10280979301	2017
10281698001	2017
10282170701	2017
10283751001	2017
10283870701	2017
10285227301	2017
10285840801	2017
10286029401	2017
10286805001	2017
10290375001	2017
10290479001	2017
10290610501	2017
10290828001	2017
10290963501	2017
10291126501	2017
10292602501	2017
10293085501	2017
10293375301	2017
10293436801	2017
10293529401	2017
10293741201	2017
10293742401	2017
10293743601	2017
10293744801	2017
10293752701	2017
10293754001	2017
10293755201	2017
10293756401	2017
10293767901	2017
10294485401	2017
10294549401	2017
10299634901	2017
10299939901	2017
10302542001	2017
10303226501	2017
10303651901	2017
10303892901	2017
10304105901	2017
10304591001	2017
10304647101	2017
10304775001	2017
10306101001	2017
10307986501	2017
10308360101	2017
10308965201	2017
10309480501	2017
10310113501	2017

10310527001	2017
10311774001	2017
10314669601	2017
10315147301	2017
10315819401	2017
10316350501	2017
10316465001	2017
10318066701	2017
10318659101	2017
10318663301	2017
10319721701	2017
10319867201	2017
10320106301	2017
10320188901	2017
10320630901	2017
10321188301	2017
10322023901	2017
10322689801	2017
10323321001	2017
10323716101	2017
10323788401	2017
10324271501	2017
10324930801	2017
10325317801	2017
10326900901	2017
10327238001	2017
10331800801	2017
10332566901	2017
10332936501	2017
10333954101	2017
10334751301	2017
10335736101	2017
10335880801	2017
10336323301	2017
10336522901	2017
10336907701	2017
10337218001	2017
10337518101	2017
10337600801	2017
10338330001	2017
10338463701	2017
10340665701	2017
10342676001	2017
10342826401	2017
10343027101	2017
10344487701	2017
10345305201	2017

10347913201	2017
10352035101	2017
10355032001	2017
10356012901	2017
10358553901	2017
10358696901	2017
10360334701	2017
10362064301	2017
10362238001	2017
10363633001	2017
10363834901	2017
10364037001	2017
10364629201	2017
10364748001	2017
10365380601	2017
10365649201	2017
10366285601	2017
10366975901	2017
10367643001	2017
10369316601	2017
10370723201	2017
10371138701	2017
10371143001	2017
10371370001	2017
10374877501	2017
10375560301	2017
10376252801	2017
10378049001	2017
10378215101	2017
10380385301	2017
10380974001	2017
10381918601	2017
10382676201	2017
10383373001	2017
10385190201	2017
10385642001	2017
10386520201	2017
10388149901	2017
10388499301	2017
10389454801	2017
10390691501	2017
10390736101	2017
10391800001	2017
10392971001	2017
10393677401	2017
10393723701	2017
60000001101	2017

60000004701	2017
60000005901	2017
60000006001	2017
60000007201	2017
60000008401	2017
60000009601	2017
60000010201	2017
60000011401	2017
60000012601	2017
60000013801	2017
60000014001	2017
60000015101	2017
60000016301	2017
60000017501	2017
60000018701	2017
60000019901	2017
60000020501	2017
60000021701	2017
60000022901	2017
60000023001	2017
60000024201	2017
60000025401	2017
60000026601	2017
60000027801	2017
60000028001	2017
60000029101	2017
60000030801	2017
60000031001	2017
60000032101	2017
60000033301	2017
60000034501	2017
60000035701	2017
60000036901	2017
60000037001	2017
60000038201	2017
60000039401	2017
60000040001	2017
60000041201	2017
60000042401	2017
60000043601	2017
60000045001	2017
60000046101	2017
60000047301	2017
60000048501	2017
60000049701	2017
60000050301	2017
60000051501	2017

60000052701	2017
60000053901	2017
60000054001	2017
60000055201	2017
60000056401	2017
60000057601	2017
60000058801	2017
60000060601	2017
60000064301	2017
60000065501	2017
60000067901	2017
60000070901	2017
60000071001	2017
60000073401	2017
60000074601	2017
60000075801	2017
60000076001	2017
60000077101	2017
60000078301	2017
60000079501	2017
60000080101	2017
60000081301	2017
60000082501	2017
60000083701	2017
60000084901	2017
60000085001	2017
60000086201	2017
60000087401	2017
60000088601	2017
60000090401	2017
60000091601	2017
60000092801	2017
60000093001	2017
60000094101	2017
60000095301	2017
60000096501	2017
60000097701	2017
60000099001	2017
60000100301	2017
60000101501	2017
60000102701	2017
60000103901	2017
60000104001	2017
60000105201	2017
60000106401	2017
60000107601	2017
60000108801	2017

60000109001	2017
60000111801	2017
60000112001	2017
60000113101	2017
60000115501	2017
60000116701	2017
60000117901	2017
60000118001	2017
60000119201	2017
60000120901	2017
60000121001	2017
60000122201	2017
60000123401	2017
60000124601	2017
60000126001	2017
60000127101	2017
60000128301	2017
60000129501	2017
60000130101	2017
60000133701	2017
60000134901	2017
60000136201	2017
60000137401	2017
60000138601	2017
60000139801	2017
60000140401	2017
60000141601	2017
60000142801	2017
60000143001	2017
60000144101	2017
60000145301	2017
60000146501	2017
60000147701	2017
60000149001	2017
60000150701	2017
60000152001	2017
60000153201	2017
60000154401	2017
60000155601	2017
60000156801	2017
60000157001	2017
60000158101	2017
60000159301	2017
60000160001	2017
60000161101	2017
60000162301	2017
60000163501	2017

60000165901	2017
60000166001	2017
60000168401	2017
60000169601	2017
60000170201	2017
60000171401	2017
60000172601	2017
60000173801	2017
60000174001	2017
60000175101	2017
60000176301	2017
60000177501	2017
60000178701	2017
60000179901	2017
60000180501	2017
60000181701	2017
60000182901	2017
60000183001	2017
60000184201	2017
60000186601	2017
60000187801	2017
60000188001	2017
60000189101	2017
60000190801	2017
60000191001	2017
60000192101	2017
60000193301	2017
60000194501	2017
60000195701	2017
60000196901	2017
60000197001	2017
60000198201	2017
60000199401	2017
60000200701	2017
60000202001	2017
60000203201	2017
60000204401	2017
60000205601	2017
60000206801	2017
60000207001	2017
60000208101	2017
60000209301	2017
60000210001	2017
60000211101	2017
60000212301	2017
60000213501	2017
60000215901	2017

60000216001	2017
60000217201	2017
60000218401	2017
60000219601	2017
60000220201	2017
60000221401	2017
60000223801	2017
60000224001	2017
60000225101	2017
60000228701	2017
60000229901	2017
60000230501	2017
60000231701	2017
60000233001	2017
60000235401	2017
60000236601	2017
60000237801	2017
60000238001	2017
60000239101	2017
60000241001	2017
60000242101	2017
60000243301	2017
60000244501	2017
60000245701	2017
60000246901	2017
60000247001	2017
60000248201	2017
60000249401	2017
60000250001	2017
60000251201	2017
60000252401	2017
60000253601	2017
60000254801	2017
60000255001	2017
60000256101	2017
60000257301	2017
60000258501	2017
60000259701	2017
60000260301	2017
60000261501	2017
60000262701	2017
60000263901	2017
60000264001	2017
60000265201	2017
60000266401	2017
60000267601	2017
60000268801	2017

60000271801	2017
60000272001	2017
60000273101	2017
60000274301	2017
60000276701	2017
60000277901	2017
60000279201	2017
60000280901	2017
60000281001	2017
60000282201	2017
60000284601	2017
60000287101	2017
60000288301	2017
60000289501	2017
60000290101	2017
60000292501	2017
60000293701	2017
60000294901	2017
60000295001	2017
60000296201	2017
60000297401	2017
60000298601	2017
60000299801	2017
60000300001	2017
60000302401	2017
60000303601	2017
60000305001	2017
60000307301	2017
60000308501	2017
60000310301	2017
60000311501	2017
60000312701	2017
60000313901	2017
60000314001	2017
60000315201	2017
60000316401	2017
60000317601	2017
60000318801	2017
60000319001	2017
60000320601	2017
60000321801	2017
60000322001	2017
60000323101	2017
60000324301	2017
60000325501	2017
60000326701	2017
60000327901	2017

60000328001	2017
60000329201	2017
60000330901	2017
60000331001	2017
60000332201	2017
60000333401	2017
60000334601	2017
60000335801	2017
60000336001	2017
60000337101	2017
60000338301	2017
60000339501	2017
60000340101	2017
60000341301	2017
60000342501	2017
60000348601	2017
60000349801	2017
60000350401	2017
60000351601	2017
60000352801	2017
60000353001	2017
60000354101	2017
60000356501	2017
60000357701	2017
60000358901	2017
60000359001	2017
60000360701	2017
60000361901	2017
60000362001	2017
60000363201	2017
60000364401	2017
60000366801	2017
60000367001	2017
60000369301	2017
60000370001	2017
60000371101	2017
60000372301	2017
60000373501	2017
60000374701	2017
60000375901	2017
60000378401	2017
60000379601	2017
60000380201	2017
60000381401	2017
60000382601	2017
60000383801	2017
60000384001	2017

60000385101	2017
60000386301	2017
60000387501	2017
60000388701	2017
60000389901	2017
60000390501	2017
60000391701	2017
60000392901	2017
60000393001	2017
60000394201	2017
60000395401	2017
60000396601	2017
60000397801	2017
60000398001	2017
60000399101	2017
60000400401	2017
60000401601	2017
60000402801	2017
60000403001	2017
60000404101	2017
60000405301	2017
60000406501	2017
60000408901	2017
60000409001	2017
60000410701	2017
60000411901	2017
60000412001	2017
60000413201	2017
60000414401	2017
60000415601	2017
60000416801	2017
60000417001	2017
60000418101	2017
60000419301	2017
60000420001	2017
60000421101	2017
60000422301	2017
60000423501	2017
60000424701	2017
60000425901	2017
60000426001	2017
60000427201	2017
60000428401	2017
60000429601	2017
60000430201	2017
60000431401	2017
60000432601	2017

60000433801	2017
60000434001	2017
60000435101	2017
60000437501	2017
60000438701	2017
60000439901	2017
60000440501	2017
60000441701	2017
60000442901	2017
60000443001	2017
60000445401	2017
60000446601	2017
60000447801	2017
60000448001	2017
60000449101	2017
60000450801	2017
60000452101	2017
60000453301	2017
60000454501	2017
60000455701	2017
60000456901	2017
60000457001	2017
60000458201	2017
60000459401	2017
60000460001	2017
60000461201	2017
60000462401	2017
60000465001	2017
60000467301	2017
60000468501	2017
60000469701	2017
60000471501	2017
60000472701	2017
60000473901	2017
60000474001	2017
60000475201	2017
60000476401	2017
60000477601	2017
60000478801	2017
60000479001	2017
60000480601	2017
60000482001	2017
60000483101	2017
60000486701	2017
60000487901	2017
60000488001	2017
60000489201	2017

60000490901	2017
60000491001	2017
60000492201	2017
60000493401	2017
60000494601	2017
60000496001	2017
60000497101	2017
60000498301	2017
60000499501	2017
60000500801	2017
60000501001	2017
60000502101	2017
60000503301	2017
60000504501	2017
60000505701	2017
60000506901	2017
60000507001	2017
60000509401	2017
60000510001	2017
60000511201	2017
60000512401	2017
60000513601	2017
60000514801	2017
60000517301	2017
60000518501	2017
60000519701	2017
60000520301	2017
60000521501	2017
60000522701	2017
60000523901	2017
60000525201	2017
60000526401	2017
60000527601	2017
60000528801	2017
60000529001	2017
60000530601	2017
60000531801	2017
60000532001	2017
60000533101	2017
60000535501	2017
60000536701	2017
60000539201	2017
60000541001	2017
60000544601	2017
60000545801	2017
60000546001	2017
60000547101	2017

60000548301	2017
60000549501	2017
60000550101	2017
60000551301	2017
60000552501	2017
60000553701	2017
60000554901	2017
60000555001	2017
60000558601	2017
60000559801	2017
60000560401	2017
60000561601	2017
60000562801	2017
60000563001	2017
60000564101	2017
60000565301	2017
60000566501	2017
60000567701	2017
60000568901	2017
60000570701	2017
60000572001	2017
60000573201	2017
60000574401	2017
60000575601	2017
60000576801	2017
60000577001	2017
60000578101	2017
60000580001	2017
60000581101	2017
60000582301	2017
60000583501	2017
60000584701	2017
60000586001	2017
60000587201	2017
60000589601	2017
60000591401	2017
60000592601	2017
60000593801	2017
60000594001	2017
60000595101	2017
60000596301	2017
60000597501	2017
60000598701	2017
60000601301	2017
60000603701	2017
60000605001	2017
60000606201	2017

60000607401	2017
60000608601	2017
60000609801	2017
60000613001	2017
60000614101	2017
60000615301	2017
60000618901	2017
60000619001	2017
60000621901	2017
60000622001	2017
60000623201	2017
60000624401	2017
60000625601	2017
60000626801	2017
60000627001	2017
60000628101	2017
60000629301	2017
60000630001	2017
60000631101	2017
60000632301	2017
60000633501	2017
60000634701	2017
60000635901	2017
60000636001	2017
60000637201	2017
60000638401	2017
60000639601	2017
60000640201	2017
60000641401	2017
60000642601	2017
60000643801	2017
60000644001	2017
60000645101	2017
60000646301	2017
60000647501	2017
60000648701	2017
60000649901	2017
60000650501	2017
60000651701	2017
60000652901	2017
60000653001	2017
60000654201	2017
60000655401	2017
60000656601	2017
60000657801	2017
60000658001	2017
60000659101	2017

60000660801	2017
60000663301	2017
60000664501	2017
60000665701	2017
60000668201	2017
60000669401	2017
60000670001	2017
60000671201	2017
60000672401	2017
60000673601	2017
60000674801	2017
60000676101	2017
60000677301	2017
60000679701	2017
60000680301	2017
60000681501	2017
60000682701	2017
60000684001	2017
60000685201	2017
60000686401	2017
60000688801	2017
60000689001	2017
60000690601	2017
60000691801	2017
60000692001	2017
60000693101	2017
60000694301	2017
60000695501	2017
60000696701	2017
60000697901	2017
60000698001	2017
60000699201	2017
60000700501	2017
60000701701	2017
60000702901	2017
60000703001	2017
60000704201	2017
60000705401	2017
60000706601	2017
60000707801	2017
60000708001	2017
60000709101	2017
60000710801	2017
60000711001	2017
60000712101	2017
60000713301	2017
60000714501	2017

60000715701	2017
60000716901	2017
60000717001	2017
60000718201	2017
60000719401	2017
60000720001	2017
60000721201	2017
60000722401	2017
60000723601	2017
60000724801	2017
60000725001	2017
9000003201	2017
9000004501	2017
9000005801	2017
9000006001	2017
9000007301	2017
9000008601	2017
9000009901	2017
9000010801	2017
10136788001	2017

APPEAL,STAYED,TYPE−E

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:16−cv−00745−PLF

NATIONAL VETERANS LEGAL SERVICES PROGRAM et al v. UNITED STATES OF AMERICA
Assigned to: Judge Paul L. Friedman
Case in other court: USCA−Federal Circuit, 19−01083−SJ
USCA−Federal Circuit, 18−00154−CP
USCA −Federal Circuit, 18−00155−CP
USCA−Federal Circuit, 19−01081−SJ
USCA−DC Circuit, 21−05291
USCA−Federal Circuit, 24−01757
Cause: 28:1346 Tort Claim

Date Filed: 04/21/2016
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

Plaintiff

NATIONAL VETERANS LEGAL SERVICES PROGRAM

represented by

Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Sreet, NW
Suite 312
Washington, DC 20036
(202) 888−1741
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
MOTLEY RICE, LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
843−216−9492
Email: moliver@motleyrice.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
1 Corporate Center
20 Church Street
17th Floor
Hartford, CT 06103
860−882−1676
Fax: 860−882−1682
Email: bnarwold@motleyrice.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
MOTLEY RICE, LLC
401 9th Street, NW
Suite 1001
Washington, DC 20004
(202) 386−9627
Fax: (843) 216−9350
Email: esmith@motleyrice.com
ATTORNEY TO BE NOTICED

Deepak Gupta
GUPTA WESSLER LLP
2001 K Street, NW

Suite 850 North
Washington, DC 20006
202−888−1741
Fax: 202−888−7792
Email: deepak@guptawessler.com
ATTORNEY TO BE NOTICED

Plaintiff

NATIONAL CONSUMER LAW CENTER

represented by **Jonathan E. Taylor**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
(See above for address)
ATTORNEY TO BE NOTICED

Deepak Gupta
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

ALLIANCE FOR JUSTICE

represented by **Jonathan E. Taylor**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
(See above for address)
ATTORNEY TO BE NOTICED

Deepak Gupta
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

UNITED STATES OF AMERICA represented by

Brenda A. Gonzalez Horowitz
DOJ−USAO
U.S. Department of Justice
601 D Street NW
Washington, DC 20530
(202) 252−2512
Email: brenda.gonzalez.horowitz@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Derek S. Hammond
COMMODITY FUTURES TRADING COMMISSION
1155 21st Street, NW
Washington, DC 20581
202−418−5000
Email: dhammond@cftc.gov
TERMINATED: 07/03/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jeremy S. Simon
DOJ−USAO
Patrick Henry Building
601 D. Street, N.W.
Washington, DC 20530
(202) 252−2528
Email: jeremy.simon@usdoj.gov
TERMINATED: 03/29/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Aaron Caplen
DOJ−USAO
601 D Street, NW
Washington, DC 20530
(202) 252−2523
Email: rcaplen@gmail.com
TERMINATED: 03/29/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian J. Field
SCHAERR JAFFE LLP
1717 K Street, NW
Suite 900
Washington, DC 20006
(202) 787−1060
Fax: (202) 776−0136
Email: bfield@schaerr−jaffe.com
TERMINATED: 06/03/2021

William Mark Nebeker
U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 Fourth Street, NW
Washington, DC 20530
(202) 252−2536
Fax: (202) 252−2599
Email: mark.nebeker@usdoj.gov
TERMINATED: 06/02/2021

V.

Interested Party

ROSEMARIE HOWELL represented by **ROSEMARIE HOWELL**
9504 N.E. 5th Street
Vancouver, WA 98664
(360) 953−0798
PRO SE

Interested Party

ROB RAWSON represented by **ROB RAWSON**
P.O. Box 632
Sanford, FL 32772−0632
PRO SE

Interested Party

TROY LAW, PLLC represented by **John Troy**
TROY LAW, PLLC
41−25 Kissena Boulevard, Suite 110
Flushing, NY 11355
718−762−2332
Email: johntroy@troypllc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Interested Party

ERIC ALAN ISAACSON represented by **ERIC ALAN ISAACSON**
6580 Avenida Mirola
La Jolla, CA 92037
(858) 263−9581
PRO SE

Movant

DON KOZICH represented by **DON KOZICH**
P.O. Box 2032
Fort Lauderdale, FL 33303−2032
(954) 709−0537
Email: dtkctr@gmail.com
PRO SE

Movant

MICHAEL T. PINES represented by **MICHAEL T. PINES**
619−771−5302
PRO SE

Amicus

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS represented by **Bruce D. Brown**
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St, NW
Suite 1020
Washington, DC 20005
(202) 795−9301
Fax: (202) 795−9310
Email: bbrown@rcfp.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

AMERICAN ASSOCIATION OF LAW LIBRARIES

represented by **Sasha Samberg−Champion**
RELMAN COLFAX PLLC
1225 19th Street NW
Suite 600
Washington, DC 20036
202−728−1888
Email: ssamberg−champion@relmanlaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

JOSEPH I. LIEBERMAN

represented by **Mark Bailen**
LAW OFFICES OF MARK I BAILEN
1250 Connecticut Avenue, NW
Suite 700
Washington, DC 20036
(202) 656−0422
Fax: (202) 261−3508
Email: mb@bailenlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

AMERICAN SOCIETY OF NEWSPAPER EDITORS

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ASSOCIATED PRESS MEDIA EDITORS

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ASSOCIATION OF ALTERNATIVE NEWS MEDIA

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

CENTER FOR INVESTIGATIVE REPORTING

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

FIRST AMENDMENT COALITION

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

FIRST LOOK MEDIA WORKS, INC.

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

INTERNATIONAL DOCUMENTARY ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

INVESTIGATIVE REPORTING WORKSHOP
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

MEDIA CONSORTIUM
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

MPA
The Association of Magazine Media
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ONLINE NEWS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

RADIO TELEVISION DIGITAL NEWS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

REPORTERS WITHOUT BORDERS
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

SEATTLE TIMES COMPANY
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

SOCIETY OF PROFESSIONAL JOURNALISTS
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

TULLY CENTER FOR FREE SPEECH represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

DEBORAH BEIM represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

THOMAS BRUCE represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

PHILLIP MALONE represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

JONATHAN ZITTRAIN represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

DARRELL ISSA represented by **Mark Bailen**
Congressman
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/21/2016	1	COMPLAINT against All Defendants *United States of America* (Filing fee $ 400 receipt number 0090−4495374) filed by NATIONAL VETERANS LEGAL SERVICES PROGRAM, ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Civil Cover Sheet, # 2 Summons to United States Attorney General, # 3 Summons to U.S. Attorney for the District of Columbia)(Gupta, Deepak) (Entered: 04/21/2016)
04/21/2016	2	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Gupta, Deepak) (Entered: 04/21/2016)
04/21/2016		Case Assigned to Judge Ellen S. Huvelle. (jd) (Entered: 04/22/2016)
04/22/2016	3	SUMMONS (2) Issued Electronically as to UNITED STATES OF AMERICA, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Consent Forms)(jd) (Entered: 04/22/2016)

04/26/2016	4	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 4/26/2016. Answer due for ALL FEDERAL DEFENDANTS by 6/25/2016. (Gupta, Deepak) (Entered: 04/26/2016)
04/26/2016	5	NOTICE of Appearance by Elizabeth S. Smith on behalf of All Plaintiffs (Smith, Elizabeth) (Entered: 04/26/2016)
04/26/2016	6	MOTION for Leave to Appear Pro Hac Vice :Attorney Name− William H. Narwold, :Firm− Motley Rice LLC, :Address− 20 Church Street, 17th Floor, Hartford, CT 06103. Phone No. − 860−882−1676. Fax No. − 860−882−1682 Filing fee $ 100, receipt number 0090−4500590. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Smith, Elizabeth) (Entered: 04/26/2016)
04/26/2016		MINUTE ORDER granting 6 Motion for Leave to Appear Pro Hac Vice: It is hereby ORDERED that the motion for leave to appear pro hac vice is GRANTED; and it is further ORDERED that William H. Narwold is admitted pro hac vice for the purpose of appearing in the above−captioned case. Signed by Judge Ellen S. Huvelle on April 26, 2016. (AG) (Entered: 04/26/2016)
05/02/2016	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 05/02/2016. (Gupta, Deepak) (Entered: 05/02/2016)
05/02/2016	8	MOTION to Certify Class by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration of Deepak Gupta, # 2 Declaration of William Narwold, # 3 Declaration of Jonathan Taylor, # 4 Text of Proposed Order)(Gupta, Deepak) (Entered: 05/02/2016)
05/16/2016	9	NOTICE of Appearance by William Mark Nebeker on behalf of UNITED STATES OF AMERICA (Nebeker, William) (Entered: 05/16/2016)
05/16/2016	10	Unopposed MOTION for Extension of Time to File Response/Reply as to 8 MOTION to Certify Class by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 05/16/2016)
05/17/2016		MINUTE ORDER: It is hereby ORDERED that defendant's unopposed 10 Motion for Extension of Time to File Response/Reply is GRANTED, and defendant's Response is due by July 11, 2016. Signed by Judge Ellen S. Huvelle on May 17, 2016. (lcesh2) (Entered: 05/17/2016)
06/27/2016	11	MOTION to Dismiss *Or, In The Alternative*, MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit (1 through 5), # 2 Text of Proposed Order)(Nebeker, William) (Entered: 06/27/2016)
07/08/2016	12	Joint MOTION for Extension of Time to File Response/Reply as to 8 MOTION to Certify Class , 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 07/08/2016)
07/08/2016		MINUTE ORDER granting 12 Motion for Extension of Time to File Response re 8 MOTION to Certify Class and 11 MOTION to Dismiss: Upon consideration of the parties' joint motion to extend the briefing schedule, it is hereby ORDERED that the motion is GRANTED; it is FURTHER ORDERED that the time within which the defendant may file a memorandum of points and authorities in response to plaintiffs' motion for class certification is further extended though July 25, 2016, and no additional extensions shall be granted; and it isFURTHER ORDERED that the time within which the plaintiffs may file a memorandum of points and authorities in response to defendant's motion to dismiss is initially extended though July 29, 2016. Signed by Judge Ellen S. Huvelle on July 7, 2016. (AG) (Entered: 07/08/2016)
07/25/2016	13	Memorandum in opposition to re 8 MOTION to Certify Class filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit A, # 2 Declaration Garcia, # 3 Text of Proposed Order)(Nebeker, William) (Entered: 07/25/2016)

07/26/2016	14	MOTION to Stay *Discovery* by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 07/26/2016)
07/29/2016	15	RESPONSE re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Exhibit Govt's MTD in Fisher, # 2 Exhibit Complaint in NVLSP v. USA, # 3 Exhibit Complaint in Fisher)(Gupta, Deepak) (Entered: 07/29/2016)
08/04/2016	16	Unopposed MOTION for Extension of Time to File Response/Reply as to 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 08/04/2016)
08/04/2016	17	REPLY to opposition to motion re 8 MOTION to Certify Class filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 08/04/2016)
08/05/2016		MINUTE ORDER granting 16 Unopposed Motion for Extension of Time to File Reply re 11 MOTION to Dismiss *Or, In The Alternative*, MOTION for Summary Judgment : Upon consideration of the Unopposed Motion For An Enlargement Of Time, And Memorandum In Support Thereof, and for the reasons set forth in support thereof, it is hereby ORDERED that the motion is GRANTED; and it is FURTHER ORDERED that the time within which Defendant may file a reply to Plaintiffs' opposition to the pending Motion To Dismiss Or, In The Alternative, For Summary Judgment is enlarged up to and including August 16, 2016. Signed by Judge Ellen S. Huvelle on August 5, 2016. (AG) (Entered: 08/05/2016)
08/09/2016	18	Joint MOTION for Scheduling Order by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 08/09/2016)
08/16/2016		MINUTE ORDER: It is hereby ORDERED that the 18 Joint Motion for Scheduling Order is GRANTED. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016		MINUTE ORDER: It is hereby ORDERED that defendant's 14 Motion to Stay is DENIED as moot. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016	19	SCHEDULING ORDER: The parties' 18 Joint Motion for Proposed Phased Schedule is hereby GRANTED. See Order for details. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016	20	REPLY to opposition to motion re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Attachments: # 1 Declaration Second Garcia)(Nebeker, William) (Entered: 08/16/2016)
08/17/2016	21	MOTION for Leave to File *Sur−Reply* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Sur−Reply, # 2 Statement of Facts, # 3 Text of Proposed Order)(Gupta, Deepak) (Entered: 08/17/2016)
08/17/2016	22	RESPONSE re 21 MOTION for Leave to File *Sur−Reply* filed by UNITED STATES OF AMERICA. (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 08/17/2016)
10/01/2016	23	NOTICE OF SUPPLEMENTAL AUTHORITY by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Opinion in Fisher v. United States)(Gupta, Deepak) (Entered: 10/01/2016)
12/05/2016		MINUTE ORDER granting in part and denying in part 21 Plaintiffs' Motion for Leave to File Sur−Reply: It is hereby ORDERED that plaintiffs may file [21−2] Plaintiffs' Concise Statement of Genuine Issues of Material Fact, but plaintiffs may not file

		[21−1] Plaintiffs' Sur−Reply. A sur−reply is unnecessary because plaintiffs seek to reply to a statement that defendant originally presented in its motion to dismiss. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	24	ORDER denying 11 Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment for the reasons stated in the accompanying Memorandum Opinion. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	25	MEMORANDUM OPINION in support of 24 Order Denying 11 Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	26	SUPPLEMENTAL MEMORANDUM (Statement of Genuine Issues of Material Fact) to re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (znmw) (Entered: 12/06/2016)
12/15/2016		MINUTE ORDER Setting Hearing on Motion: It is hereby ORDERED that a motion hearing on 8 Plaintiffs' MOTION to Certify Class is set for 1/18/2017 at 02:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on December 15, 2016. (lcesh2) (Entered: 12/15/2016)
12/19/2016	27	ANSWER to Complaint by UNITED STATES OF AMERICA.(Nebeker, William) (Entered: 12/19/2016)
01/18/2017		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Motion Hearing held on 1/18/2017, re 8 MOTION to Certify Class, heard and taken under advisement. (Court Reporter Scott Wallace) (gdf) (Entered: 01/18/2017)
01/20/2017	28	AFFIDAVIT re 8 MOTION to Certify Class *of Daniel L. Goldberg* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	29	AFFIDAVIT re 8 MOTION to Certify Class *of Stuart Rossman* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	30	AFFIDAVIT re 8 MOTION to Certify Class *of Barton F. Stichman* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	31	AFFIDAVIT re 8 MOTION to Certify Class *of Deepak Gupta (Second)* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Gupta, Deepak) (Entered: 01/20/2017)
01/24/2017	32	ORDER granting 8 Plaintiffs' Motion to Certify Class for the reasons stated in the accompanying Memorandum Opinion. See Order for details. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered: 01/24/2017)
01/24/2017	33	MEMORANDUM OPINION in support of 32 Order Granting 8 Plaintiffs' Motion to Certify Class. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered: 01/24/2017)
01/24/2017	34	SCHEDULING ORDER: See Order for deadlines and details. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered: 01/24/2017)
02/14/2017	35	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 1−18−17; Page Numbers: (1−29). Date of Issuance:1−29−17. Court Reporter/Transcriber Scott Wallace, Telephone number 202−354−3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court

		reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 3/7/2017. Redacted Transcript Deadline set for 3/17/2017. Release of Transcript Restriction set for 5/15/2017.(Wallace, Scott) (Entered: 02/14/2017)
02/21/2017	36	NOTICE of Appearance by Brian J. Field on behalf of All Defendants (Field, Brian) (Entered: 02/21/2017)
02/23/2017	37	Unopposed MOTION For Approval of Plan of Class Notice by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 − Email Notice, # 2 Exhibit 2 − Postcard Notice, # 3 Exhibit 2 − Website Notice, # 4 Text of Proposed Order)(Narwold, William) (Entered: 02/23/2017)
02/28/2017	38	RESPONSE re 37 Unopposed MOTION For Approval of Plan of Class Notice filed by UNITED STATES OF AMERICA. (Nebeker, William) (Entered: 02/28/2017)
03/31/2017	39	NOTICE *of Joint Filing of Proposed Order* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 37 Unopposed MOTION For Approval of Plan of Class Notice (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 03/31/2017)
03/31/2017	40	Consent MOTION for Protective Order by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 03/31/2017)
04/03/2017	41	STIPULATED PROTECTIVE ORDER granting 40 Motion for Protective Order. Signed by Judge Ellen S. Huvelle on April 3, 2017. (lcesh2) (Entered: 04/03/2017)
04/13/2017	42	Unopposed MOTION for Approval of Revised Plan of Class Notice and Class Notice Documents by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 − Email Notice, # 2 Exhibit 1−A − BLACKLINE Email Notice, # 3 Exhibit 2 − Postcard Notice, # 4 Exhibit 2−A − BLACKLINE Postcard Notice, # 5 Exhibit 3 − Website Notice, # 6 Exhibit 3−A − BLACKLINE Website Notice, # 7 Exhibit 4 − Online Exclusion, # 8 Exhibit 5 − Printable Exclusion, # 9 Exhibit 6 − Proposed Order, # 10 Exhibit 6−A − BLACKLINE Proposed Order)(Narwold, William) (Entered: 04/13/2017)
04/14/2017	43	NOTICE *of Filing of Revised Notice Documents* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 Revised Email Notice, # 2 Exhibit 1A Revised and Blacklined Email Notice, # 3 Exhibit 2 Revised Postcard Notice, # 4 Exhibit 2A Revised and Blacklined Postcard Notice)(Narwold, William) (Entered: 04/14/2017)
04/17/2017	44	ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents: See Order for details. Signed by Judge Ellen S. Huvelle on April 17, 2017. (lcesh2) (Entered: 04/17/2017)
04/17/2017		MINUTE ORDER finding as moot 37 Motion for Approval of Class Notice in light of approval of 42 Motion for Approval of Revised Class Notice. Signed by Judge Ellen S. Huvelle on April 17, 2017. (AG) (Entered: 04/17/2017)
05/22/2017	45	NOTICE to Exclude by ROSEMARIE HOWELL re 44 ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents (jf) (Entered: 05/24/2017)
06/15/2017	46	MOTION for Order for Exclusion by ROB RAWSON. "Let this be filed" signed by Judge Ellen Segal Huvelle on 06/09/2017 (jf) Modified event title on 6/16/2017

		(znmw). (Entered: 06/15/2017)
06/15/2017		MINUTE ORDER: It is hereby ORDERED that the Clerk shall mail a copy of 46 NOTICE of and MOTION For An Order For Exclusion filed by ROB RAWSON to the PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940−3434. Signed by Judge Ellen S. Huvelle on June 15, 2017. (lcesh2) (Entered: 06/15/2017)
07/05/2017	47	NOTICE of Change of Address by Deepak Gupta (Gupta, Deepak) (Entered: 07/05/2017)
07/05/2017	48	Unopposed MOTION for Extension of Time to File *Motion for Summary Judgment* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 07/05/2017)
07/05/2017		MINUTE ORDER granting 48 Unopposed Motion for Extension of Time to File Motion for Summary Judgment: Upon consideration of the plaintiffs' unopposed motion to extend the briefing schedule, it is hereby ORDERED that the motion is GRANTED; and it is FURTHER ORDERED that the time within which the plaintiffs may file their motion for summary judgment solely on the issue of liability, i.e., whether the fees charged to access records through PACER violate the E−Government Act of 2002, Pub. L. No. 107−347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note), is extended through August 28, 2017; and it is FURTHER ORDERED that the defendant shall file its opposition 20 days after this date, on September 18, 2017, and the plaintiffs' reply is due 10 days after that, on September 28, 2017, consistent with this Courts scheduling order entered on January 24, 2017. Signed by Judge Ellen S. Huvelle on July 5, 2017. (AG) (Entered: 07/05/2017)
07/07/2017		Set/Reset Deadlines: Plaintiff's Summary Judgment motion due by 8/28/2017. Response to Motion for Summary Judgment due by 9/18/2017. Plaintiff's Reply in support of Motion for Summary Judgment due by 9/28/2017. (hs) (Entered: 07/07/2017)
07/17/2017	49	MOTION for Leave to File Amicus Curiae, MOTION to Appear by Phone, by DON KOZICH (Attachments: # 1 Exhibit Application to Proceed In Forma Pauperis)(jf) Modified text on 7/19/2017 (znmw). (Entered: 07/18/2017)
07/19/2017	50	SUPPLEMENT re 45 NOTICE to Exclude by ROSEMARIE HOWELL re 44 ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents filed by ROSEMARIE HOWELL. (jf) (Entered: 07/19/2017)
08/24/2017	51	NOTICE of Change of Address by Elizabeth S. Smith (Smith, Elizabeth) (Entered: 08/24/2017)
08/28/2017	52	MOTION for Summary Judgment *as to Liability* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration Declaration of Jonathan Taylor, # 2 Exhibit Exhibit A, # 3 Exhibit Exhibit B, # 4 Exhibit Exhibit C, # 5 Exhibit Exhibit D, # 6 Exhibit Exhibit E, # 7 Exhibit Exhibit F, # 8 Exhibit Exhibit G, # 9 Exhibit Exhibit H, # 10 Exhibit Exhibit I, # 11 Exhibit Exhibit J, # 12 Exhibit Exhibit K, # 13 Exhibit Exhibit L, # 14 Exhibit Exhibit M, # 15 Declaration Declaration of Thomas Lee and Michael Lissner, # 16 Statement of Facts Plaintiffs' Statement of Undisputed Material Facts)(Gupta, Deepak) (Entered: 08/28/2017)
09/05/2017	53	MOTION for Leave to File *Amicus Curiae Brief* by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Proposed Order, # 3 Certificate of Corporate Disclosure)(Brown, Bruce) (Entered: 09/05/2017)
09/05/2017	54	NOTICE of Appearance by Sasha Samberg−Champion on behalf of AMERICAN ASSOCIATION OF LAW LIBRARIES (Samberg−Champion, Sasha) (Entered: 09/05/2017)
09/05/2017	55	MOTION for Leave to File *Brief Amici Curiae* by AMERICAN ASSOCIATION OF LAW LIBRARIES (Attachments: # 1 Proposed Brief, # 2 Text of Proposed Order)(Samberg−Champion, Sasha) (Entered: 09/05/2017)

09/05/2017	56	MOTION for Leave to File *Amicus Curiae Brief* by JOSEPH I. LIEBERMAN (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Text of Proposed Order)(Bailen, Mark) (Entered: 09/05/2017)
09/13/2017	57	MOTION for Extension of Time to File Response/Reply by UNITED STATES OF AMERICA (Field, Brian) (Entered: 09/13/2017)
09/13/2017		MINUTE ORDER granting 53 55 56 Movants' Motions for Leave to File Briefs as Amicus Curiae: Upon consideration of the above−referenced motions, plaintiffs' consent and defendant's representation that it will not oppose, it is hereby ORDERED that the motions are GRANTED and movants are granted leave to file briefs as amicus curiae. Signed by Judge Ellen S. Huvelle on September 13, 2017. (AG) (Entered: 09/13/2017)
09/13/2017	58	RESPONSE re 57 MOTION for Extension of Time to File Response/Reply filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/13/2017)
09/13/2017	59	AMICUS BRIEF by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWS MEDIA, CENTER FOR INVESTIGATIVE REPORTING, FIRST AMENDMENT COALITION, FIRST LOOK MEDIA WORKS, INC., INTERNATIONAL DOCUMENTARY ASSOCIATION, INVESTIGATIVE REPORTING WORKSHOP, MEDIA CONSORTIUM, MPA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS WITHOUT BORDERS, SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, TULLY CENTER FOR FREE SPEECH. (znmw) (Entered: 09/14/2017)
09/13/2017	60	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWS MEDIA, CENTER FOR INVESTIGATIVE REPORTING, FIRST AMENDMENT COALITION, FIRST LOOK MEDIA WORKS, INC., INTERNATIONAL DOCUMENTARY ASSOCIATION, INVESTIGATIVE REPORTING WORKSHOP, MEDIA CONSORTIUM, MPA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTERS WITHOUT BORDERS, SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, TULLY CENTER FOR FREE SPEECH identifying Other Affiliate SYRACUSE UNIVERSITY for TULLY CENTER FOR FREE SPEECH; Other Affiliate AMERICAN UNIVERSITY SCHOOL OF COMMUNICATION for INVESTIGATIVE REPORTING WORKSHOP; Corporate Parent MCCLATCHY COMPANY for SEATTLE TIMES COMPANY. (znmw) (Entered: 09/14/2017)
09/13/2017	61	AMICUS BRIEF by AMERICAN ASSOCIATION OF LAW LIBRARIES, DEBORAH BEIM, THOMAS BRUCE, PHILLIP MALONE, JONATHAN ZITTRAIN. (znmw) (Entered: 09/14/2017)
09/13/2017	62	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by AMERICAN ASSOCIATION OF LAW LIBRARIES. (See Docket Entry 61 to view document). (znmw) (Entered: 09/14/2017)
09/13/2017	63	AMICUS BRIEF by JOSEPH I. LIEBERMAN, DARRELL ISSA. (znmw) (Entered: 09/14/2017)
09/14/2017		MINUTE ORDER granting in part and denying in part 57 defendant's Motion for Extension of Time to File Response re 52 plaintiffs' MOTION for Summary Judgment *as to Liability*: Upon consideration of defendant's motion, plaintiff's partial consent and partial opposition thereto, and the entire record herein, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that defendant shall have until November 2, 2017, to file its response to plaintiffs' motion for summary judgment; and it is further ORDERED that plaintiffs reply is due by November 13, 2017. Signed by Judge Ellen S. Huvelle on September 14, 2017. (AG) (Entered: 09/14/2017)

09/25/2017	64	Verified MOTION For Free Access To Pacer by DON KOZICH (jf) (Entered: 09/27/2017)
09/29/2017	65	RESPONSE re 64 MOTION For Free Access To Pacer filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/29/2017)
10/02/2017	66	ORDER DENYING as moot 64 Motion for Free Access to PACER Until Final Disposition of this Case. Signed by Judge Ellen S. Huvelle on October 2, 2017. (lcesh2,) (Entered: 10/02/2017)
10/10/2017	67	MOTION to Clarify Minute Order dated 09/13/2017 by DON KOZICH (jf) (Entered: 10/13/2017)
10/17/2017	68	ORDER denying 49 Motion for Leave to File Amicus Brief and to Appear Telephonically; denying as moot 67 Motion to Clarify: see Order for details. Signed by Judge Ellen S. Huvelle on October 17, 2017. (lcesh2) (Entered: 10/17/2017)
10/30/2017	69	Unopposed MOTION for Extension of Time to File Response/Reply as to 52 MOTION for Summary Judgment *as to Liability* by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 10/30/2017)
10/30/2017	72	STRIKEN PURSUANT TO MINUTE ORDER FILED ON 11/9/17.....Verified MOTION with Briefing by ROSEMARIE HOWELL (Attachments: # 1 Appendix 1, # 2 Appendix 2, # 3 Appendix 3)(jf) Modified on 11/12/2017 (zgdf). (Entered: 11/08/2017)
10/31/2017		MINUTE ORDER granting 69 Unopposed Motion for Extension of Time to File Response re 52 MOTION for Summary Judgment as to Liability: Upon Consideration of the Unopposed Motion For An Enlargement Of Time, AndMemorandum In Support Thereof in response thereto, and for the reasons set forth in support thereof, it is hereby ORDERED that the motion should be and is hereby GRANTED; and it is FURTHER ORDERED that Defendant file its opposition to Plaintiff's Motion For Summary Judgment As To Liability (ECF No. 52) on or before November 17, 2017; and it is FURTHER ORDERED that Plaintiffs may respond to Defendant's filing on or before December 5, 2017. Signed by Judge Ellen S. Huvelle on October 31, 2017. (AG) (Entered: 10/31/2017)
10/31/2017	70	MOTION for Reconsideration re 68 Order on Motion for Miscellaneous Relief, Order on Motion for Leave to File, Order on Motion to Clarify by DON KOZICH (Attachments: # 1 Exhibit)(jf) (Entered: 11/01/2017)
11/06/2017	71	ORDER denying 70 Motion for Reconsideration of October 17, 2017 Order Denying Petitioners Motion for Clarification of September 13, 2017 Order and Denying Petitioners Motion to File Amicus Curiae; and granting Movant access to documents filed in this case. See Order for details. Signed by Judge Ellen S. Huvelle on November 6, 2017. (lcesh2) (Entered: 11/06/2017)
11/09/2017		MINUTE ORDER: It is hereby ORDERED that Rosemarie Howell's Verified Motion with Briefing 72 is STRICKEN from the docket as filed without leave of Court; it is further ORDERED that leave to file is denied because Rosemarie Howell has opted out of the class, see ECF 45; and it is further ORDERED that the Clerk shall return the motion to Rosemarie Howell, along with a copy of this Minute Order. Signed by Judge Ellen S. Huvelle on November 9, 2017. (lcesh2) (Entered: 11/09/2017)
11/17/2017	73	Cross MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Declaration Decl. of W. Skidgel, # 3 Statement of Facts, # 4 Text of Proposed Order)(Field, Brian) (Entered: 11/17/2017)
11/17/2017	74	Memorandum in opposition to re 52 MOTION for Summary Judgment *as to Liability* filed by UNITED STATES OF AMERICA. (Attachments: # 1 Memorandum in Support, # 2 Declaration Decl. of W. Skidgel, # 3 Statement of Facts, # 4 Text of Proposed Order)(Field, Brian) (Entered: 11/17/2017)
12/05/2017	75	REPLY to opposition to motion re 52 MOTION for Summary Judgment *as to Liability*, filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments:

		# 1 Statement of Facts Response to Defendant's Statement of Facts)(Gupta, Deepak) Modified to remove link on 12/6/2017 (znmw). (Entered: 12/05/2017)
12/05/2017	76	Memorandum in opposition to re 73 Cross MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (See Docket Entry 75 to view document). (znmw) (Entered: 12/06/2017)
12/08/2017	77	MOTION for Extension of Time to File Response/Reply as to 73 Cross MOTION for Summary Judgment by UNITED STATES OF AMERICA (Field, Brian) (Entered: 12/08/2017)
12/08/2017		MINUTE ORDER granting in part and denying in part 77 defendant's opposed Motion for Extension of Time to File Reply re 73 Cross Motion for Summary Judgment: Upon consideration of the above−referenced motion, and the entire record herein, it is hereby ORDERED that the motion is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED that defendant shall have until January 5, 2018, to file its reply in support of its cross−motion for summary judgment. Signed by Judge Ellen S. Huvelle on December 8, 2017. (lcesh2) (Entered: 12/08/2017)
12/12/2017	78	LEAVE TO FILE DENIED− Declaration of Amended Service. This document is unavailable as the Court denied its filing. "Leave To File Denied" Signed by Judge Ellen S. Huvelle on 12/12/2017. (jf) (Entered: 12/15/2017)
01/05/2018	79	REPLY to opposition to motion re 73 Cross MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 01/05/2018)
02/27/2018		MINUTE ORDER Setting Hearing on Motions: It is hereby ORDERED that a hearing on 52 plaintiffs' MOTION for Summary Judgment as to Liability and 73 defendant's Cross MOTION for Summary Judgment is set for Monday, March 19, 2017, at 11:00 a.m. in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on February 27, 2018. (AG) (Entered: 02/27/2018)
03/01/2018	80	Consent MOTION to Continue *Motions Hearing* by UNITED STATES OF AMERICA (Field, Brian) (Entered: 03/01/2018)
03/02/2018		MINUTE ORDER granting in part and denying in part 80 Consent Motion to Continue: Upon consideration of the Consent Motion to Continue, it is hereby ORDERED that the motion is granted in part and denied in part; and it is further ORDERED that the Summary Judgment Motions Hearing presently set for 3/19/2018 is CONTINUED TO 3/21/2018 at 11:00 AM in Courtroom 23A. Signed by Judge Ellen S. Huvelle on March 2, 2018. (AG) (Entered: 03/02/2018)
03/15/2018	81	NOTICE *Of Filing* by UNITED STATES OF AMERICA re 52 MOTION for Summary Judgment *as to Liability*, Order Setting Hearing on Motion, 73 Cross MOTION for Summary Judgment (Attachments: # 1 Exhibit Tabs 1 through 40)(Nebeker, William) (Entered: 03/15/2018)
03/21/2018	82	Unopposed MOTION for Leave to Appear Pro Hac Vice :Attorney Name− Meghan Oliver, :Firm− Motley Rice LLC, :Address− 28 Bridgeside Blvd, Mt. Pleasant, SC 29464. Phone No. − 843−216−9492. Fax No. − 843−216−9430 Filing fee $ 100, receipt number 0090−5382765. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration Declaration of Meghan Oliver, # 2 Text of Proposed Order Proposed Order)(Smith, Elizabeth) (Entered: 03/21/2018)
03/21/2018		MINUTE ORDER: It is hereby ORDERED that the hearing on plaintiffs' MOTION for Summary Judgment as to Liability and defendant's Cross MOTION for Summary Judgment is CONTINUED from Wednesday, March 21, 2018, to Friday, March 23, 2018, at 1:30 p.m. in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)
03/21/2018		MINUTE ORDER granting 82 Unopposed Motion for Leave to Appear Pro Hac Vice: Upon consideration of the above−referenced motion, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that Meghan Oliver is admitted pro hac vice for the purpose of appearing in the above−captioned case. Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)

03/21/2018	83	Unopposed MOTION for Leave to Appear Pro Hac Vice :Attorney Name− Jonathan Taylor, :Firm− Gupta Wessler PLLC, :Address− jon@guptawessler.com. Phone No. − 2028881741. Fax No. − 2028887792 *Address: 1900 L Street NW, Suite 312, Washington DC 20036* Filing fee $ 100, receipt number 0090−5383035. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration of Jonathan Taylor, # 2 Text of Proposed Order)(Gupta, Deepak) (Entered: 03/21/2018)
03/21/2018		MINUTE ORDER granting 83 Unopposed Motion for Leave to Appear Pro Hac Vice: Upon consideration of the Unopposed MOTION for Leave to Appear Pro Hac Vice, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that Jonathan Taylor is admitted pro hac vice for the purpose of appearing in proceedings in the above−captioned case. Counsel is reminded that pursuant to LCvR 83.2(c)(2) "An attorney who engages in the practice of law from an office located in the District of Columbia must be a member of the District of Columbia Bar and the Bar of this Court to file papers in this Court." Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)
03/22/2018		Set/Reset Hearings: Motion Hearing set for 3/23/2018 at 1:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. (gdf) (Entered: 03/22/2018)
03/23/2018		Minute Entry; for proceedings held before Judge Ellen S. Huvelle: Oral Arguments held on 3/23/2018. Plaintiffs' 52 MOTION for Summary Judgment as to Liability and Defendant's 73 Cross MOTION for Summary Judgment; heard and Taken Under Advisement. (Court Reporter Lisa Griffith) (hs) (Entered: 03/23/2018)
03/24/2018	84	NOTICE by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit Ex. A, # 2 Exhibit Ex. B, # 3 Exhibit Ex. C, # 4 Exhibit Ex. D, # 5 Exhibit Ex. E, # 6 Exhibit Ex. F, # 7 Exhibit Ex. G)(Field, Brian) (Entered: 03/24/2018)
03/28/2018	85	RESPONSE *to Defendant's supplemental authority* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 84 Notice (Other) (Gupta, Deepak) Modified event title on 3/29/2018 (znmw). (Entered: 03/28/2018)
03/29/2018	86	RESPONSE re 85 Notice (Other) filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 03/29/2018)
03/29/2018	87	REPLY re 86 Response to Document filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 03/29/2018)
03/31/2018	88	ORDER denying 52 plaintiffs' Motion for Summary Judgment; granting in part and denying in part 73 defendant's Motion for Summary Judgment; and setting Status Conference for 4/18/2018 at 03:00 PM in Courtroom 23A. Joint status report due by April 16, 2018. Signed by Judge Ellen S. Huvelle on March 31, 2018. (AG) (Entered: 03/31/2018)
03/31/2018	89	MEMORANDUM OPINION accompanying Order, ECF No. 88 , denying 52 plaintiffs' Motion for Summary Judgment and granting in part and denying in part defendant's Cross−Motion for Summary Judgment. Signed by Judge Ellen S. Huvelle on March 31, 2018. (AG) Modified on 4/2/2018 to remove attachment. Attachment docketed separately for opinion posting purposes.(ztnr) (Entered: 03/31/2018)
03/31/2018	90	ATTACHMENT to 89 Memorandum & Opinion Signed by Judge Ellen S. Huvelle on March 31, 2018. (ztnr) (Entered: 04/02/2018)
04/02/2018		Set/Reset Deadlines: Joint Status Report due by 4/16/2018. (gdf) (Entered: 04/02/2018)
04/16/2018	91	Joint STATUS REPORT *Proposing a Schedule to Govern Further Proceedings* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 04/16/2018)
04/18/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Status Conference held on 4/18/2018. Status Report due by 5/11/2018. Status Conference set for

		5/18/2018 at 1:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. (Court Reporter Lisa Griffith) (gdf) (Entered: 04/18/2018)
04/18/2018	92	ORDER setting Status Conference for May 18, 2018, at 1:30 p.m. in Courtroom 23A. Joint Status Report due by May 11, 2018. See order for details. Signed by Judge Ellen S. Huvelle on April 18, 2018. (AG) (Entered: 04/18/2018)
04/26/2018	93	MOTION for Extension of Time to *File Status Report*, MOTION to Continue *Status Conference* by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit, # 2 Text of Proposed Order)(Field, Brian) (Entered: 04/26/2018)
04/27/2018		MINUTE ORDER denying 93 Motion for Extension of Time to file Status Report; granting in part and denying in part 93 Motion to Continue Status Conference: Upon consideration of defendant's motion, plaintiffs' opposition thereto, and the entire record herein, it is hereby ORDERED that defendant's motion for an extension of time to file a status report is DENIED; and it is further ORDERED that defendant's motion to continue the Status Conference presently set for May 18, 2018, is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED that the Status Conference presently scheduled for May 18, 2018, is RESCHEDULED to May 17, 2018, at 11:00 a.m. in Courtroom 23A. Signed by Judge Ellen S. Huvelle on April 27, 2018. (AG) (Entered: 04/27/2018)
05/11/2018	94	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 05/11/2018)
05/17/2018	95	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 3−23−18; Page Numbers: 1−121. Date of Issuance:5−17−18. Court Reporter/Transcriber Lisa Griffith, Telephone number (202) 354−3247, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 6/7/2018. Redacted Transcript Deadline set for 6/17/2018. Release of Transcript Restriction set for 8/15/2018.(Griffith, Lisa) (Entered: 05/17/2018)
05/17/2018	96	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 4−18−18; Page Numbers: 1−38. Date of Issuance:5−17−18. Court Reporter/Transcriber Lisa Griffith, Telephone number (202) 354−3247, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 6/7/2018. Redacted Transcript Deadline set for 6/17/2018. Release of Transcript Restriction set for 8/15/2018.(Griffith, Lisa) (Entered: 05/17/2018)
05/17/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle on 5/17/18 : Status Conference held. Order to be issued. Joint Status Report due by 7/13/18. Further Status Conference set for 7/18/18 at 12:00 PM in Courtroom 23A before Judge Ellen S. Huvelle. (Court Reporter: Lisa Griffith) (kk) (Entered: 05/17/2018)
05/17/2018	97	ORDER re discovery and future proceedings. Joint Status Report due by 7/13/2018. Status Conference set for 7/18/2018 at 12:00 PM in Courtroom 23A before Judge Ellen S. Huvelle. See order for details. Signed by Judge Ellen S. Huvelle on May 17,

		2018. (AG) (Entered: 05/17/2018)
07/13/2018	98	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 07/13/2018)
07/13/2018	99	MOTION for Certification for interlocatory appeal, MOTION to Stay by UNITED STATES OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Field, Brian). Added MOTION to Stay on 7/17/2018 (jf). (Entered: 07/13/2018)
07/18/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Status Conference held on 7/18/2018. Parties should submit a report by the C.O.B. on Friday, 7/20/18. (Court Reporter: Scott Wallace) (gdf) (Entered: 07/19/2018)
07/20/2018	100	NOTICE *Regarding Annual Courtroom Technology Expenditures* by UNITED STATES OF AMERICA (Field, Brian) (Entered: 07/20/2018)
07/20/2018	101	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 07/20/2018)
07/27/2018	102	RESPONSE re 99 MOTION for Certification for interlocatory appeal MOTION to Stay filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 07/27/2018)
08/02/2018	103	REPLY to opposition to motion re 99 MOTION for Certification for interlocatory appeal MOTION to Stay filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 08/02/2018)
08/13/2018	104	ORDER granting in part and denying in part 99 defendant's Motion for to Certify Orders for Interlocutory Appeal; amending Order filed on March 31, 2018, ECF No. 88 , to certify for interlocutory appeal for the reasons stated in an accompanying Memorandum Opinion, ECF No. 105 ; and granting 99 unopposed Motion to Stay. See order for details. Signed by Judge Ellen S. Huvelle on August 13, 2018. (AG) (Entered: 08/13/2018)
08/13/2018	105	MEMORANDUM OPINION accompanying August 13, 2018 Order, ECF No. 104 , re certification of March 31, 2018 Order, ECF No. 88 for interlocutory appeal. Signed by Judge Ellen S. Huvelle on August 13, 2018. (AG) (Entered: 08/13/2018)
08/20/2018	106	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 7−18−18; Page Numbers: 1−21. Date of Issuance:7−18−18. Court Reporter/Transcriber Scott Wallace, Telephone number 202−354−3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter.<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 9/10/2018. Redacted Transcript Deadline set for 9/20/2018. Release of Transcript Restriction set for 11/18/2018.(Wallace, Scott) (Entered: 08/20/2018)
08/23/2018		USCA for the Federal Circuit Case Number 18−154−CP (zrdj) (Entered: 08/23/2018)
08/23/2018		USCA for the Federal Circuit Case Number 18−155−CP (zrdj) (Entered: 08/23/2018)
10/16/2018		USCA for the Federal Circuit Case Number 19−1081−SJ (zrdj) (Entered: 10/18/2018)
10/16/2018		USCA for the Federal Circuit Case Number 19−1083−SJ (zrdj) (Entered: 10/18/2018)
11/28/2018	107	NOTICE OF GRANT OF PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. Filing fee $ 505, receipt

		number 0090−5811958. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 USCA Order)(Narwold, William) Modified on 11/29/2018 to correct docket event/text (jf). (Entered: 11/28/2018)
11/29/2018	108	Transmission of the Notice of Grant of Permission to Appeal Under 28 U.S.C. § 1292(B)and Docket Sheet to Federal Circuit. The appeal fee was paid this date re 107 Notice of Appeal to the Federal Circuit. (jf) (Entered: 11/29/2018)
09/10/2020	109	ENTERED IN ERROR.....Case randomly reassigned to Judge Christopher R. Cooper. Judge Ellen S. Huvelle is no longer assigned to the case. (rj) Modified on 9/11/2020 (rj). (Entered: 09/11/2020)
09/10/2020	110	Case directly reassigned to Judge Paul L. Friedman by consent. Judge Christopher R. Cooper is no longer assigned to the case. (rj) (Entered: 09/11/2020)
09/28/2020	111	MANDATE of USCA as to 107 Notice of Appeal to the Federal Circuit, filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER ; USCA Case Number 19−1081, 19−1083. (Attachments: # 1 USCA Judgment)(zrdj) (Entered: 09/29/2020)
12/11/2020		MINUTE ORDER: In view of the recent decision by the United States Court of Appeals for the Federal Circuit remanding this case for further proceedings, it is ORDERED that the parties file a joint status report on or before December 23, 2020 addressing how they wish to proceed. Signed by Judge Paul L. Friedman on 12/11/2020. (lceg) (Entered: 12/11/2020)
12/23/2020	112	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 12/23/2020)
12/29/2020		MINUTE ORDER: In light of the parties joint status report 112 , this matter is STAYED until June 25, 2021. The parties shall file a joint status report on or before June 18, 2021 updating the Court on the status of any mediation. Signed by Judge Paul L. Friedman on 12/29/2020. (lceg) (Entered: 12/29/2020)
12/29/2020		Set/Reset Deadlines: Status Report due by 6/18/2021. (tj) (Entered: 12/29/2020)
06/02/2021	113	NOTICE OF SUBSTITUTION OF COUNSEL by Robert Aaron Caplen on behalf of UNITED STATES OF AMERICA Substituting for attorney W. Mark Nebeker (Caplen, Robert) (Entered: 06/02/2021)
06/03/2021	114	NOTICE OF SUBSTITUTION OF COUNSEL by Jeremy S. Simon on behalf of UNITED STATES OF AMERICA Substituting for attorney Brian J. Field (Simon, Jeremy) (Entered: 06/03/2021)
06/16/2021	115	Joint STATUS REPORT by NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 06/16/2021)
06/16/2021		MINUTE ORDER: In light of 115 the parties' joint status report, this matter is STAYED until September 23, 2021. The parties shall file a joint status report on or before September 16, 2021, updating the Court on the progress of their discussions. Signed by Judge Paul L. Friedman on June 16, 2021. (lcaf) (Entered: 06/16/2021)
08/26/2021	116	MOTION to Intervene, MOTION to Modify by MICHAEL T. PINES. (Attachments: # 1 Declaration redacted)(ztd); ("Leave to file Granted" signed 8/26/2021 by Judge Paul L. Friedman) Modified on 10/1/2021 (znmw). Added MOTION for Sanctions on 10/1/2021 (znmw). (Entered: 08/27/2021)
08/26/2021	117	SEALED DOCUMENT (MOTION FOR INTERVENTION AND LEAVE TO FILE) filed by MICHAEL T. PINES. (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Declaration)(ztd);("Leave to File Granted − Document Under Seal" signed 8/26/2021 by Judge Paul L. Friedman) (Entered: 08/27/2021)
08/27/2021		MINUTE ORDER: Counsel for the parties are directed to file responses to 116 Mr. Pines' motion to intervene on or before September 10, 2021. Signed by Judge Paul L. Friedman on August 27, 2021. (lcaf) (Entered: 08/27/2021)

09/08/2021	118	MOTION for Extension of Time to *File Response to Motion for Intervention, to Modify Class Certification Order, and for Sanctions* by UNITED STATES OF AMERICA. (Attachments: # 1 Proposed Order)(Simon, Jeremy) Modified event on 9/9/2021 (ztd). (Entered: 09/08/2021)
09/09/2021	119	ORDER granting 118 defendant's motion for extension of time up to and including October 1, 2021 within which to respond to motion for intervention, to modify class certification order and for sanctions. Signed by Judge Paul L. Friedman on September 9, 2021. (MA) (Entered: 09/09/2021)
09/09/2021	120	Memorandum in opposition to re 118 MOTION for Extension of Time to File Response/Reply filed by MICHAEL T. PINES. (ztd) (Entered: 09/10/2021)
09/09/2021	121	NOTICE by MICHAEL T. PINES (ztd) (Entered: 09/10/2021)
09/10/2021	122	RESPONSE re 116 MOTION to Intervene MOTION for Leave to File filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/10/2021)
09/14/2021		MINUTE ORDER: The Court has reviewed 121 Mr. Pines' notice requesting reconsideration of 119 the Court's order granting the government an extension of time up to October 1, 2021 in which to respond to the motion to intervene. The Court concludes that Mr. Pines has not demonstrated that he will suffer prejudice as a result of the extension of time, and the government has established good cause for the extension of time. The Court therefore will not alter the deadline for the government's response to the motion to intervene. The government, in its response to the motion to intervene, is directed to also address the concerns about delay raised in 120 121 Mr. Pines' notices. Signed by Judge Paul L. Friedman on September 14, 2021. (lcaf) (Entered: 09/14/2021)
09/15/2021	123	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 09/15/2021)
09/17/2021		MINUTE ORDER: In light of the parties' representations concerning settlement discussions in 123 the joint status report, the stay in this case is extended through November 22, 2021. The parties shall file a joint status report on or before November 15, 2021, notifying the Court of the progress of their discussions. Signed by Judge Paul L. Friedman on September 17, 2021. (lcaf) (Entered: 09/17/2021)
10/01/2021	124	RESPONSE re 116 MOTION to Intervene MOTION for Leave to File filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/01/2021)
10/12/2021		MINUTE ORDER: The Court has reviewed the parties' briefs 122 124 in opposition to 116 Mr. Pines's Motion for Intervention, Motion to Modify Class Certification Order, and for Sanctions. On or before October 26, 2021, the parties are directed to file supplemental briefs addressing (1) whether, to the parties' knowledge, Mr. Pines is in fact a member of the class in this case; (2) if so, whether Mr. Pines has opted out of the class, and noting any applicable deadlines for opting out; and (3) setting forth the legal standard for a motion for intervention by a class member. Signed by Judge Paul L. Friedman on October 12, 2021. (lcaa) (Entered: 10/12/2021)
10/21/2021	125	Emergency MOTION for Order to Reactivate PACER Account by MICHAEL T. PINES. "Let this be filed," signed by Judge Paul L. Friedman on 10/21/2021. (znmw) (Entered: 10/25/2021)
10/26/2021	126	SUPPLEMENTAL MEMORANDUM to re Order,, *(Supplemental Brief In Response To Court Order Dated October 12, 2021)* filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/26/2021)
10/26/2021	127	RESPONSE TO ORDER OF THE COURT re Order,, *REGARDING MICHAEL PINESS MOTION FOR INTERVENTION, TO MODIFY THE CLASS DEFINITION, AND FOR SANCTIONS* filed by NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 10/26/2021)
11/01/2021	128	RESPONSE re 125 MOTION for Order *(Defendant's Response to Michael Pines' Motion to Reactivate Pines' PACER Account)* filed by UNITED STATES OF

		AMERICA. (Simon, Jeremy) (Entered: 11/01/2021)
11/15/2021	129	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 11/15/2021)
11/15/2021	131	PER CURIAM ORDER of USCA (certified copy) filed re: petitioner Michael T. Pines, granting motion for in forma pauperis; dismissing petition for writ of mandamus; dismissing as moot motion to reactivate Pacer account; USCA Case Number 21−5204. (znmw) (Entered: 11/16/2021)
11/16/2021		MINUTE ORDER: In light of the parties' representations concerning settlement discussions in 129 the Joint Status Report, the stay in this case is extended through January 27, 2022. The parties shall file a further joint status report on or before January 20, 2022 notifying the Court of the progress of their settlement efforts. Signed by Judge Paul L. Friedman on November 16, 2021. (lcaa) (Entered: 11/16/2021)
11/16/2021	130	MEMORANDUM OPINION AND ORDER denying 116 Mr. Pines pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions; denying as moot Mr. Pines Motion for Pretrial Conference and to Appoint a Special Master; denying as moot 125 Mr. Pines Emergency Motion for Order to Reactivate PACER Account; and granting Mr. Pines Application to Proceed in District Court Without Prepaying Fees or Costs. The Clerk of the Court is directed to file that application on the docket in this case. Signed by Judge Paul L. Friedman on November 16, 2021. (MA) (Entered: 11/16/2021)
11/16/2021		Set/Reset Deadlines: Joint Status Report due by 1/20/2022 (hs) (Entered: 11/16/2021)
12/16/2021	132	NOTICE OF APPEAL as to 130 Memorandum & Opinion by MICHAEL T. PINES. Fee Status: IFP. Parties have been notified. (znmw) Modified fee status on 12/17/2021 (znmw). (Entered: 12/17/2021)
12/17/2021	133	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The fee was not paid because it was filed in forma pauperis re 132 Notice of Appeal. (znmw) (Entered: 12/17/2021)
12/27/2021		USCA Case Number 21−5291 for 132 Notice of Appeal filed by MICHAEL T. PINES. (zjf) (Entered: 12/27/2021)
01/20/2022	134	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 01/20/2022)
01/21/2022		MINUTE ORDER: In consideration of the joint status report 134 filed on January 20, 22, it is hereby ORDERED that the parties shall file a further joint status report on or before April 1, 2022, and that the stay of proceedings is extended through April 8, 2022. Signed by Judge Paul L. Friedman on January 21, 2022. (MA) (Entered: 01/21/2022)
04/01/2022	135	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 04/01/2022)
05/17/2022	136	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 05/17/2022)
05/18/2022		MINUTE ORDER: In consideration of the parties' 135 joint status report and 136 joint status report, it is hereby ORDERED that the parties shall file a further joint status report on or before June 30, 2022, and that the stay of proceedings is extended from April 8, 2022 through July 12, 2022. Signed by Judge Paul L. Friedman on May 18, 2022. (lcjr) (Entered: 05/18/2022)
06/29/2022	137	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 06/29/2022)
06/30/2022		MINUTE ORDER: In consideration of the parties' 137 joint status report, it is hereby ORDERED that the parties shall file a further joint status report on or before August 12, 2022, and that the stay of proceedings is extended from July 12, 2022, to August 26, 2022. Signed by Judge Paul L. Friedman on June 30, 2022. (ATM) (Entered:

		06/30/2022)
08/12/2022	138	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 08/12/2022)
08/12/2022		MINUTE ORDER: In consideration of the parties' 138 joint status report, it is hereby ORDERED that the plaintiffs shall file a motion for an order approving settlement notice to the class, pursuant to Fed. R. Civ. P. 23(e)(1), on or before September 26, 2022, and that the stay of proceedings is extended from August 12, 2022 to September 26, 2022. Signed by Judge Paul L. Friedman on August 12, 2022. (lcjr) (Entered: 08/12/2022)
09/22/2022	139	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/22/2022)
09/22/2022		MINUTE ORDER: In consideration of the parties' 139 joint status report, it is hereby ORDERED that the plaintiffs shall file a motion for an order approving settlement notice to the class, pursuant to Fed. R. Civ. P. 23(e)(1), on or before October 15, 2022, and that the stay of proceedings is extended from September 22, 2022 to October 15, 2022. Signed by Judge Paul L. Friedman on September 22, 2022. (ATM) (Entered: 09/22/2022)
10/11/2022	140	MOTION for Settlement *Preliminary Approval* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Text of Proposed Order Proposed Order)(Gupta, Deepak) (Entered: 10/11/2022)
10/11/2022	141	DECLARATION *of Deepak Gupta* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 140 MOTION for Settlement *Preliminary Approval* filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Exhibit Settlement Agreement, # 2 Exhibit Supplemental Settlement Agreement, # 3 Exhibit Proposed Notice Plan, # 4 Exhibit KCC (Administrator) Declaration)(Gupta, Deepak) (Entered: 10/11/2022)
10/28/2022	142	RESPONSE re 140 MOTION for Settlement *Preliminary Approval (Defendant's Response to Motion for Preliminary Approval of Class Settlement)* filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/28/2022)
11/14/2022	143	MANDATE of USCA as to 132 Notice of Appeal to DC Circuit Court filed by MICHAEL T. PINES ; USCA Case Number 21−5291. (Attachment: # 1 USCA Order September 28, 2022)(zjm) (Entered: 11/15/2022)
11/28/2022		MINUTE ORDER: The parties shall appear for a status conference on December 6, 2022 at 9:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on November 28, 2022. (lceh) (Entered: 11/28/2022)
11/29/2022		Set/Reset Hearings: Status Conference set for 12/6/2022 at 9:00 AM before Judge Paul L. Friedman via zoom video. (tj) (Entered: 11/29/2022)
12/06/2022		Minute Entry for proceedings held Via Videoconference (ZOOM) before Judge Paul L. Friedman: Status Conference held on 12/6/2022.Parties Updated The Court In Regards To The Current Posture Of This Matter. Parties Will Confer And Contact The Court's Chambers In Regards To the Next Status Conference Date. (Court Reporter TAMMY NESTOR.) (mac) (Entered: 12/06/2022)
12/07/2022		MINUTE ORDER: The parties shall appear for a status conference on January 12, 2023 at 10:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on December 7, 2022. (lceh) (Entered: 12/07/2022)
12/12/2022		Set/Reset Hearings: Status Conference set for 1/12/2023 at 10:00 AM before Judge Paul L. Friedman via zoom video. (tj) (Entered: 12/12/2022)

01/11/2023	144	STIPULATION *(Stipulated Supplement to Protective Order)* by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 01/11/2023)
01/11/2023		MINUTE ORDER: The status conference scheduled for January 12, 2023 at 10:00 a.m. is hereby VACATED. The Court will reschedule the status conference for a later date. Signed by Judge Paul L. Friedman on January 11, 2023. (lceh) (Entered: 01/11/2023)
01/13/2023	145	TRANSCRIPT OF PROCEEDINGS before Judge Paul L. Friedman held on 12/6/22; Page Numbers: 1−10. Court Reporter/Transcriber Tammy Nestor, Telephone number 2023543127, Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript m ay be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 2/3/2023. Redacted Transcript Deadline set for 2/13/2023. Release of Transcript Restriction set for 4/13/2023.(Nestor, Tammy) (Entered: 01/13/2023)
01/17/2023		MINUTE ORDER: The parties shall appear for a status conference on February 22, 2023 at 11:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on January 17, 2023. (lceh) (Entered: 01/17/2023)
02/02/2023	146	ORDER approving 144 Stipulated Supplement to 41 Protective Order. Signed by Judge Paul L. Friedman on February 2, 2023. (lceh) (Entered: 02/02/2023)
02/22/2023		Minute Entry for proceedings held before Judge Paul L. Friedman: Status Conference held on 2/22/2023. Parties inform the court of the status of this action with regard to settlement. Next Status Conference is set for 4/5/2023 at 10:00 AM in before Judge Paul L. Friedman via zoom video. (Court Reporter: Sara Wick) (tj) (Entered: 02/22/2023)
03/29/2023	147	NOTICE OF SUBSTITUTION OF COUNSEL by Derek S. Hammond on behalf of All Defendants Substituting for attorney Jeremy S. Simon and Robert A. Caplen (Hammond, Derek) (Entered: 03/29/2023)
04/05/2023		Minute Entry for Zoom Status Conference proceeding held on 4/5/23 before Judge Paul L. Friedman. The parties updated the Court on the status of the case. A revised Motion for Settlement Preliminary Approval due within a week. Court Reporter: Stacy Heavenridge (zgf) (Entered: 04/05/2023)
04/12/2023	148	Amended MOTION for Settlement *Preliminary Approval* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 04/12/2023)
04/12/2023	149	DECLARATION *of Deepak Gupta* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 148 Amended MOTION for Settlement *Preliminary Approval* filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Exhibit Settlement Agreement, # 2 Exhibit First Amendment to Settlement Agreement, # 3 Exhibit Second Amendment to Settlement Agreement, # 4 Exhibit Revised Notice Plan & Exhibits 1−6, # 5 Exhibit KCC Supplemental Declaration)(Gupta, Deepak) (Entered: 04/12/2023)

04/26/2023	150	RESPONSE re 148 Amended MOTION for Settlement *Preliminary Approval* filed by UNITED STATES OF AMERICA. (Hammond, Derek) (Entered: 04/26/2023)
04/27/2023	151	REPLY to opposition to motion re 148 Amended MOTION for Settlement *Preliminary Approval Reply in Further Support of Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement [ECF No. 148]* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Proposed Order)(Narwold, William) (Entered: 04/27/2023)
05/08/2023	152	NOTICE *of Submission of Revised Proposed Order and Revised Notice Documents* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 148 Motion for Settlement (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Revised Proposed Order)(Narwold, William) (Entered: 05/08/2023)
05/08/2023	153	ORDER granting plaintiffs' 148 Revised Motion for Preliminary Approval of Class Settlement. The Court shall convene a Settlement Hearing on October 12, 2023, at 10:00 a.m. in the Ceremonial Courtroom (Courtroom 20) at the United States District Court for the District of Columbia, 333 Constitution Avenue, NW, Washington, D.C. 20001. See Order for details. Signed by Judge Paul L. Friedman on May 8, 2023. (ATM) (Entered: 05/08/2023)
05/10/2023		Set/Reset Hearings: Settlement Conference set for 10/12/2023 at 10:00 AM in Ceremonial Courtroom before Judge Paul L. Friedman. (tj) (Entered: 05/10/2023)
06/07/2023	154	MOTION to Amend/Correct *the Opt−Out Deadline* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Proposed Order)(Narwold, William) (Entered: 06/07/2023)
06/07/2023	155	ORDER granting 154 Motion to Amend the Opt−Out Deadline. See Order for details. Signed by Judge Paul L. Friedman on June 7, 2023. (lceh) (Entered: 06/07/2023)
06/28/2023		Set/Reset Deadlines: Opt−Out deadline 8/20/2023. (tj) (Entered: 06/28/2023)
07/03/2023	156	NOTICE OF SUBSTITUTION OF COUNSEL by Brenda A. Gonzalez Horowitz on behalf of UNITED STATES OF AMERICA Substituting for attorney Derek S. Hammond (Gonzalez Horowitz, Brenda) (Entered: 07/03/2023)
08/08/2023	157	NOTICE of Appearance by John Troy on behalf of TROY LAW, PLLC (Troy, John) (Entered: 08/08/2023)
08/28/2023	158	MOTION for Settlement *Final Approval*, MOTION for Attorney Fees , *Costs, and Expenses* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Declaration of NVLSP, # 2 Declaration of NCLC, # 3 Declaration of AFJ, # 4 Declaration of Brian Fitzpatrick, # 5 Declaration of Deepak Gupta, # 6 Declaration of Meghan Oliver, # 7 Declaration of Gio Santiago, # 8 Text of Proposed Order)(Gupta, Deepak) (Entered: 08/28/2023)
09/12/2023	159	RESPONSE re 158 MOTION for Settlement *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by UNITED STATES OF AMERICA. (Gonzalez Horowitz, Brenda) (Entered: 09/12/2023)
09/21/2023		MINUTE ORDER: In light of the 153 Order granting plaintiffs' 148 Revised Motion for Preliminary Approval of Class Settlement, plaintiffs' original 140 Motion for Preliminary Approval of Class Settlement is hereby DENIED AS MOOT. Signed by Judge Paul L. Friedman on September 21, 2023. (lceh) (Entered: 09/21/2023)
10/03/2023	160	REPLY to opposition to motion re 158 MOTION for Settlement *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Declaration of Brian Fitzpatrick, # 2 Declaration of William Rubenstein, # 3 Declaration of Deepak Gupta, # 4 Declaration of Meghan Oliver, # 5 Declaration of Gio Santiago)(Gupta, Deepak) (Entered: 10/03/2023)

10/04/2023	161	ORDER changing Settlement Hearing location. The Settlement Hearing will be held on October 12, 2023, at 10:00 a.m. (Eastern Daylight Time) in Courtroom 29 in the William B. Bryant Annex to the United States District Court for the District of Columbia, 333 Constitution Avenue N.W., Washington, D.C. 20001. See Order for details. Signed by Judge Paul L. Friedman on October 4, 2023. (lcak) (Entered: 10/04/2023)
10/04/2023	162	ORDER setting Settlement Hearing procedures. See Order for details. Signed by Judge Paul L. Friedman on October 4, 2023. (lcak) (Entered: 10/04/2023)
10/06/2023	163	OBJECTION re 162 Order, Memorandum & Opinion filed by DON KOZICH. (Attachments: # 1 Exhibits, # 2 Certificate of Service)(zjm) (Entered: 10/11/2023)
10/06/2023	164	MOTION for Leave to Appear by Telephone or Zoom by DON KOZICH. (See Docket Entry 163 to view document) (zjm) (Entered: 10/11/2023)
10/11/2023	165	RESPONSE re 163 OBJECTION *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) Modified on 10/12/2023 to correct event/ docket link (zjm). (Entered: 10/11/2023)
10/11/2023		Set/Reset Hearings: Settlement Hearing set for 10/12/2023 at 10:00 AM in Courtroom 29A− In Person (Audio Line Available) before Judge Paul L. Friedman. (tj) (Entered: 10/11/2023)
10/11/2023		MINUTE ORDER granting Don Kozich's 164 Motion to Appear Telephonically or by Zoom. Zoom details will be sent in advance of the Settlement Hearing. Signed by Judge Paul L. Friedman on October 11, 2023. (lcak) (Entered: 10/11/2023)
10/11/2023	166	NOTICE *of Filing of Objections* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Greenspan Objection, # 2 Exhibit Jiggetts Objection, # 3 Exhibit Miller Objection, # 4 Exhibit Kozich Objection, # 5 Exhibit Isaacson Objection, # 6 Exhibit Isaacson Written Statement)(Gupta, Deepak) (Entered: 10/11/2023)
10/12/2023		Minute Entry for proceedings held before Judge Paul L. Friedman: Settlement Hearing held on 10/12/2023. The court takes all filings and oral argument under consideration. (Court Reporter: Elizabeth Saint Loth.) (tj) (Entered: 10/12/2023)
10/13/2023	167	NOTICE of Appearance by Meghan S.B. Oliver on behalf of ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Oliver, Meghan) (Entered: 10/13/2023)
10/13/2023	168	NOTICE *Notice of Submission of Payment Notification Forms* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 − Account Holder Notification Form, # 2 Exhibit 2 −Payer Notification Form, # 3 Exhibit 3 − USO Payment Notification − Email Template, # 4 Exhibit 4 − Dispute Form)(Narwold, William) (Entered: 10/13/2023)
03/20/2024	169	OPINION granting Plaintiffs' 158 Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards. See Opinion for details. Signed by Judge Paul L. Friedman on March 20, 2024. (ATM) (Entered: 03/20/2024)
03/20/2024	170	FINAL JUDGMENT AND ORDER granting 158 Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards. See Final Judgment and Order for details. Signed by Judge Paul L. Friedman on March 20, 2024. (ATM) (Entered: 03/20/2024)
04/18/2024	171	ENTERED IN ERROR.....NOTICE OF APPEAL TO DC CIRCUIT COURT as to 170 Memorandum & Opinion,, Order, 169 Memorandum & Opinion by ERIC ALAN ISAACSON. Filing fee $ 605, receipt number 207171. Fee Status: Fee Paid. Parties have been notified. (zjm) Modified on 4/24/2024 (zjm). (Entered: 04/24/2024)
04/24/2024	172	ENTERED IN ERROR.....Transmission of the Notice of Appeal, Order Appealed (Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 171 Notice of Appeal to DC Circuit Court. (zjm) Modified on 4/24/2024 (zjm).

		(Entered: 04/24/2024)
04/24/2024	173	NOTICE OF APPEAL to the Federal Circuit as to 170 Order, 169 Opinion by ERIC ALAN ISAACSON. Filing fee $ 605, receipt number 207171. Fee Status: Fee Paid. Parties have been notified. (zjm) (Entered: 04/24/2024)
04/24/2024	174	Transmission of the Notice of Appeal, Order Appealed (Opinion), and Docket Sheet to Federal Circuit. The appeal fee was paid re 173 Notice of Appeal to the Federal Circuit. (zjm) (Entered: 04/24/2024)
04/30/2024		USCA Case Number 24−1757 for 173 Notice of Appeal to the Federal Circuit filed by ERIC ALAN ISAACSON. (znmw) (Entered: 04/30/2024)
05/15/2024	175	TRANSCRIPT OF PROCEEDINGS, before Judge Paul L. Friedman, held on 10−12−2023; Page Numbers: 1 − 112. Date of Issuance: 5−15−2024. Court Reporter: Elizabeth SaintLoth, Telephone number: 202−354−3242. Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 6/5/2024. Redacted Transcript Deadline set for 6/15/2024. Release of Transcript Restriction set for 8/13/2024.(Saint−Loth, Elizabeth) (Entered: 05/15/2024)
05/24/2024	176	TRANSCRIPT OF STATUS CONFERENCE before Judge Paul L. Friedman held on 02/22/2023. Page Numbers: 1−13. Date of Issuance: 05/24/2024. Court Reporter: Sara Wick, telephone number 202−354−3284. Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty−one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 6/14/2024. Redacted Transcript Deadline set for 6/24/2024. Release of Transcript Restriction set for 8/22/2024.(Wick, Sara) (Entered: 05/24/2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM,
1600 K Street, NW
Washington, DC 20006

NATIONAL CONSUMER LAW CENTER,
1001 Connecticut Avenue, NW
Washington, DC 20036

ALLIANCE FOR JUSTICE,
11 Dupont Circle, NW
Washington, DC 20036,

for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
950 Pennsylvania Avenue, NW
Washington, DC 20530,
Defendant.

Case No. _____

CLASS ACTION COMPLAINT

INTRODUCTION

The Administrative Office of the U.S. Courts (AO) requires people to pay a fee to access records through its Public Access to Court Electronic Records system, commonly known as PACER. This action challenges the legality of those fees for one reason: the fees far exceed the cost of providing the records. In 2002, Congress recognized that "users of PACER are charged fees that are higher than the marginal cost of disseminating the information," and sought to ensure that records would instead be "freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). To that end, the E-Government Act of 2002 authorizes PACER fees "as a charge for services rendered," but "only to the extent necessary" "to reimburse expenses in providing these services." 28 U.S.C. § 1913 note.

Despite this express statutory limitation, PACER fees have twice been increased since the Act's passage. This prompted the Act's sponsor to reproach the AO for continuing to charge fees "well higher than the cost of dissemination"—"against the requirement of the E-Government Act"—rather than doing what the Act demands: "create a payment system that is used only to recover the direct cost of distributing documents via PACER." Instead of complying with the law, the AO has used excess PACER fees to cover the costs of unrelated projects—ranging from audio systems to flat screens for jurors—at the expense of public access.

This noncompliance with the E-Government Act has inhibited public understanding of the courts and thwarted equal access to justice. And the AO has further compounded those harms by discouraging fee waivers, even for *pro se* litigants, journalists, researchers, and nonprofits; by prohibiting the free transfer of information by those who obtain waivers; and by hiring private collection lawyers to sue people who cannot afford to pay the fees.

The plaintiffs are three national nonprofit organizations that have downloaded public court records from PACER—downloads for which they agreed to incur fees, and were in fact charged fees, in excess of the cost of providing the records. Each download thus gave rise to a separate claim for illegal exaction in violation of the E-Government Act. On behalf of themselves and a nationwide class of those similarly situated, they ask this Court to determine that the PACER fee schedule violates the E-Government Act and to award them a full recovery of past overcharges.[1]

[1] This case is the first effort to challenge the PACER fee schedule by parties represented by counsel. A now-dismissed *pro se* action, *Greenspan v. Administrative Office*, No. 14-cv-2396 (N.D. Cal.), did seek to challenge the fees (among a slew of other claims), but it was dismissed on jurisdictional grounds inapplicable here. Last year, two other cases were filed alleging that PACER, in violation of its own terms and conditions, overcharges its users due to a systemic billing error concerning the display of some HTML docket sheets—an issue not raised in this case. *Fisher v. Duff*, 15-5944 (W.D. Wash), and *Fisher v. United States*, 15-1575C (Ct. Fed. Cl.). Neither case challenges the PACER fee schedule itself, as this case does.

PARTIES

1. Plaintiff National Veterans Legal Services Program (NVLSP) is a nonprofit organization founded in 1980 and based in Washington, D.C. It seeks to ensure that American veterans and active-duty personnel receive the full benefits to which they are entitled for disabilities resulting from their military service. Over the years, the organization has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs. As a result, NVLSP has paid fees to the PACER Service Center to obtain public court records within the past six years.

2. Plaintiff National Consumer Law Center (NCLC) is a national nonprofit organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. From its offices in Washington, D.C. and Boston, NCLC pursues these goals through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation, and does so on a wide range of issues, including consumer protection, unfair and deceptive acts and practices, privacy rights, civil rights, and employment. Among other things, NCLC prepares and publishes 20 different treatise volumes on various consumer-law topics. In the course of its research, litigation, and other activities, NCLC has paid fees to the PACER Service Center to obtain public court records within the past six years.

3. Plaintiff Alliance for Justice (AFJ) is a nonprofit corporation with its headquarters in Washington, D.C. and offices in Los Angeles, Oakland, and Dallas. It is a national association of over 100 public-interest organizations that focus on a broad array of issues—including civil rights, human rights, women's rights, children's rights, consumer rights, and ensuring legal representation for all Americans. Its members include AARP, the Center for Digital Democracy,

Consumers Union, the National Center on Poverty Law, and the National Legal Aid & Defender Association. On behalf of these groups and the public-interest community, AFJ works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. AFJ has paid fees to the PACER Service Center to obtain public court records within the past six years.

4. Defendant United States of America, through the AO and its PACER Service Center, administers PACER and charges fees for access to public court records.

JURISDICTION AND VENUE

5. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a). Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000.

6. The Court has personal jurisdiction over all parties to this lawsuit, and venue is proper under 28 U.S.C. § 1391 and 28 U.S.C. § 1402(a).

FACTUAL ALLEGATIONS

How PACER works: A brief overview

7. PACER is a decentralized system of electronic judicial-records databases. It is managed by the AO, and each federal court maintains its own database. Any person may access records through PACER by registering for an online account and searching the applicable court database. Before accessing a particular record, however, each person must first agree to pay a specific fee, shown on the computer screen, which says: "To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser." The current fee is $.10 per page (with a maximum of $3.00 per record) and $2.40 per audio file. There is no charge for judicial opinions. Only if the person affirmatively agrees to pay the fee will a PDF of the record appear for downloading and printing. Unless that person obtains a fee waiver or

incurs less than $15 in PACER charges in a given quarter, he or she will have a contractual obligation to pay the fees.

How we got here: Congress authorizes fees "to reimburse" PACER expenses.

8. This system stretches back to the early 1990s, when Congress began requiring the federal judiciary to charge "reasonable fees . . . for access to information available through automatic data processing equipment," including records available through what is now known as PACER. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress sought to limit the amount of the fees to the cost of providing access to the records: "All fees hereafter collected by the Judiciary . . . *as a charge for services rendered* shall be deposited as offsetting collections . . . *to reimburse expenses incurred in providing these services*." *Id.* (emphasis added). When the system moved from a dial-in phone service to an Internet portal in 1998, the AO set the PACER fees at $.07 per page (introducing in 2002 a maximum of $2.10 per request), without explaining how it arrived at these figures. *See* Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program, http://1.usa.gov/1lrrM78.

9. It soon became clear that these amounts were far more than necessary to recover the cost of providing access to electronic records. But rather than reduce the fees to cover only the costs incurred, the AO instead decided to use the extra revenue to subsidize other information-technology-related projects—a mission creep that only grew worse over time.

The AO begins using excess PACER fees to fund ECF.

10. The expansion began in 1997, when the judiciary started planning for a new e-filing system called ECF. The AO produced an internal report discussing how the system would be funded. It emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." Admin. Office of the U.S. Courts, *Electronic Case Files in the*

Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead (discussion draft), at 34 (Mar. 1997). Yet, just two pages later, the AO contemplated that the ECF system could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36. The AO believed that these fees could lawfully be used not only to reimburse the cost of providing access to records through PACER, but also for technology-related purposes more broadly, including "electronic filings, electronic documents, use of the Internet, etc." *Id.* The AO did not offer any statutory authority to support this view.

Congress responds by passing the E-Government Act of 2002.

11. After the AO began charging PACER fees that exceeded the cost of providing access to records, Congress did not respond by relaxing the statutory requirement that the fees be limited to those costs. To the contrary, when Congress revisited the subject of PACER fees a few years later, it amended the statute to *strengthen* this requirement.

12. Recognizing that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information," Congress amended the law "to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). The result was a provision of the E-Government Act of 2002 that amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note). The full text of the statute is thus as follows:

> **(a)** The Judicial Conference may, *only to the extent necessary*, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections *for access to information*

> *available through automatic data processing equipment*. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> **(b)** The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) *as a charge for services rendered* shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphasis added).

Even after the E-Government Act, the AO increases PACER fees.

13. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges and Clerks (Oct. 21, 2004). To justify this increase, the AO did not point to any growing costs of providing access to records through PACER. It relied instead on the fact that the judiciary's information-technology fund—the account into which PACER fees and other funds (including appropriations) are deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. As before, the AO cited no statutory authority for this increase.

The AO finds new ways to spend extra PACER fees as they continue to grow.

14. Even expanding the conception of costs to cover ECF did not bring the PACER balance sheet to zero. Far from it: By the end of 2006, the judiciary's information-technology fund had accumulated a surplus of nearly $150 million—at least $32 million of which was from PACER fees. Admin. Office, *Judiciary Information Technology Annual Report for Fiscal Year 2006*, at 8, http://bit.ly/1V5B9p2. But once again, the AO declined to reduce or eliminate PACER fees,

and instead chose to seek out new ways to spend the excess, using it to fund "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Quoted in Letter from Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durban and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010).

15. Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House. She explained that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds." *Id.*

The E-Government Act's sponsor says that the AO is violating the law.

16. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the statute. He noted that the Act's "goal" was "to increase free public access to [judicial] records," yet "PACER [is] charging a higher rate" than it did when the law was passed. Importantly, he explained, "the funds generated by these fees are still well higher than the cost of dissemination." He asked the Judicial Conference to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." Letter from Sen. Lieberman to Hon. Lee Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conf. of the U.S. (Feb. 27, 2009).

17. The Judicial Conference replied with a letter adhering to the AO's view that it is authorized to use PACER fees to recoup non-PACER-related costs. The letter did not identify any statutory language supporting this view, and acknowledged that the E-Government Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" Letter from Hon. Lee Rosenthal and James C. Duff, Judicial Conf. of the U.S., to Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs (Mar. 26, 2009). The letter did not cite any statute that says otherwise. Yet it claimed that Congress, since 1991, has "expand[ed] the permissible use of the fee revenue to pay for other services"—even though Congress has actually done the opposite, enacting the E-Government Act in 2002 specifically to limit any fees to those "necessary" to "reimburse expenses incurred" in providing the records. 28 U.S.C. § 1913 note. The sole support the AO offered for its view was a sentence in a conference report accompanying the 2004 appropriations bill, which said only that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." *Id.* The letter did not provide any support (even from a committee report) for using the fees to recover non-PACER-related expenses beyond ECF.

18. Later, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up." And it has done so for only one reason: so that the AO can fund "initiatives that are unrelated to providing public access via PACER." He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to recover the direct cost of distributing documents via PACER"—not other technology-related projects that "should be funded through direct appropriations." Letter from

Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durban and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010).

The AO again increases PACER fees.

19. Undeterred by Senator Lieberman's concerns, the AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." Admin. Office, *Electronic Public Access Program Summary* 1 (2012), http://1.usa.gov/1Ryavr0. But the AO believed that the fees comply with the E-Government Act because they "are only used for public access, and are not subject to being redirected for other purposes." *Id.* at 10. It did not elaborate.

20. In a subsequent congressional budget summary, however, the judiciary reported that (of the money generated from "Electronic Public Access Receipts") it spent just $12.1 million on "public access services" in 2012, while spending more than $28.9 million on courtroom technology. *The Judiciary: Fiscal Year 2014 Congressional Budget Summary*, App. 2.4.

The AO continues to charge more in fees than the cost of PACER.

21. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees and to use these fees to fund activities beyond providing access to records. In 2014, for example, the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems. Admin. Office of the U.S. Courts, *The Judiciary Fiscal Year 2016 Congressional Budget Summary* 12.2 (Feb. 2015). When questioned during a House appropriations hearing that same year, representatives from the judiciary acknowledged that "the Judiciary's Electronic

Public Access Program encompasses more than just offering real-time access to electronic records." *Financial Services and General Government Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014).

22. Some members of the federal judiciary have been open about the use of PACER revenue to cover unrelated expenses. For example, Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has acknowledged that the fees "also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat-screen monitors. . . . [There have also been] audio enhancements. . . . We spent a lot of money on audio so the people could hear what's going on. . . . This all ties together and it's funded through these [PACER] fees." Hon. William Smith, Panel Discussion on Public Electronic Access to Federal Court Records at the William and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), bit.ly/1PmR0LJ.

The AO's policy of limiting fee waivers and targeting those who cannot pay the fees

23. The judiciary's decision to increase PACER fees to fund these (otherwise unobjectionable) expenses has created substantial barriers to accessing public records—for litigants, journalists, researchers, and others. The AO has compounded these barriers through a policy of discouraging fee waivers, even for journalists, *pro se* litigants, and nonprofits; by prohibiting the transfer of information, even for free, by those who manage to obtain waivers; and by hiring private collection lawyers to sue individuals who cannot pay the fees.

24. Two examples help illustrate the point: In 2012, journalists at the Center for Investigative Reporting applied "for a four-month exemption from the per page PACER fee." *In re Application for Exemption from Elec. Public Access Fees*, 728 F.3d 1033, 1035–36 (9th Cir. 2013). They "wanted to comb court filings in order to analyze 'the effectiveness of the court's conflict-

checking software and hardware to help federal judges identify situations requiring their recusal,'" and "planned to publish their findings" online. *Id.* at 1036. But their application was denied because policy notes accompanying the PACER fee schedule instruct courts not to provide a fee waiver to "members of the media" or anyone not in one of the specific groups listed. *Id.* at 1035. The Ninth Circuit held that it could not review the denial. *Id.* at 1040.

25. The other example is from five years earlier, when private collection lawyers representing the PACER Service Center brought suit in the name of the United States against "a single mother of two minor children" who had "no assets whatsoever," claiming that she owed $30,330.80 in PACER fees. *See* Compl. in *United States v. Deanna Manning*, No. 07-cv-04595, filed July 3, 2007 (C.D. Cal.); Answer, Dkt. 12, filed Oct. 16, 2007. Representing herself, the woman "admit[ted] to downloading and printing a small amount [of] material from PACER, no more than $80 worth," which "would be 1,000 pages, actually much more than she remembers printing." Answer, Dkt. 12, at 1. But she explained that "[t]here is no way she would have had enough paper and ink to print 380,000 pages as the Complaint alleges," so "[t]his must be a huge mistake." *Id.* She concluded: "Our great and just government would have better luck squeezing blood from a lemon than trying to get even a single dollar from this defendant who can barely scrape up enough money to feed and clothe her children." *Id.* at 2. Only then did the government dismiss the complaint.

CLASS ACTION ALLEGATIONS

26. The plaintiffs bring this class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

27. The plaintiffs seek certification of the following class:

> *All individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government.*

28. The class is so numerous that joinder of all members is impractical. While the exact number and identity of class members is unknown to the plaintiffs at this time and can only be ascertained through appropriate discovery, the plaintiffs believe that the number of class members is approximately 2,000,000. The precise number and identification of the class members will be ascertainable from the defendant's records.

29. There are questions of law and fact common to all members of the class. Those common questions include, but are not limited to, the following:

(i) Are the fees imposed for PACER access excessive in relation to the cost of providing the access—that is, are the fees higher than "necessary" to "reimburse expenses incurred in providing the[] services" for which they are "charge[d]"? 28 U.S.C. § 1913 note.

(ii) What is the measure of damages for the excessive fees charged?

30. The plaintiffs' claims are typical of the claims of the class because they, like the class members, paid the uniform fees required by the defendant in order to access PACER.

31. The plaintiffs will fairly and adequately protect the interests of the class because each of them has paid PACER fees during the class period, their interests do not conflict with the interests of the class, and they have obtained counsel experienced in litigating class actions and matters involving similar or the same questions of law.

32. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the plaintiffs' claims. Joinder of all members is impracticable. Furthermore, because the injury suffered by the individual class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

CLAIM FOR RELIEF: ILLEGAL EXACTION

33. The plaintiffs bring this case under the Little Tucker Act, 28 U.S.C. § 1346(a), which waives sovereign immunity and "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–74 (Fed. Cir. 1996) (allowing an illegal-exaction claim for excess user fees). Courts have long recognized such an "illegal exaction" claim—a claim that money was "improperly paid, exacted, or taken from the claimant" in violation of a statute, *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)—regardless of whether the statute itself creates an express cause of action. As one court has explained, "the lack of express money-mandating language in the statute does not defeat [an] illegal exaction claim" because "otherwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

34. Here, each download of a public record for which the plaintiffs agreed to incur a fee, and were in fact charged a fee, gives rise to a separate illegal-exaction claim. The fees charged by the defendant for the use of PACER exceeded the amount that could be lawfully charged, under the E-Government Act of 2002 and other applicable statutory authority, because they did not reasonably reflect the cost to the government of the specific service for which they are charged. The plaintiffs are entitled to the return or refund of the excessive PACER fees illegally exacted or otherwise unlawfully charged.

PRAYER FOR RELIEF

The plaintiffs request that the Court:

a. Certify this action as a class action under Federal Rule of Civil Procedure 23(b)(3);

b. Declare that the fees charged for access to records through PACER are excessive;

c. Award monetary relief for any PACER fees collected by the defendant in the past six years that are found to exceed the amount authorized by law;

d. Award the plaintiffs their costs, expenses, and attorney fees under 28 U.S.C. § 2412 and/or from a common fund; and

e. Award all other appropriate relief.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

MICHAEL T. KIRKPATRICK (D.C. Bar No. 486293)
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
Phone: (202) 662-9535
Fax: (202) 662-9634
michael.kirkpatrick@law.georgetown.edu

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007
Phone: (202) 232-5504
Fax: (202) 232-5513
bnarwold@motleyrice.com

Attorneys for Plaintiffs

April 21, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This case challenges the legality of fees charged to access records through the Public Access to Court Electronic Records system, commonly known as PACER. The theory of liability is that these fees—set at the same rate across the judiciary—far exceed the cost of providing the records, and thus violate the E-Government Act, which authorizes fees "as a charge for services rendered," but "only to the extent necessary" to "reimburse expenses in providing these services." 28 U.S.C. § 1913 note. As the Act's sponsor put it: PACER fees are now "well higher than the cost of dissemination" and hence "against the requirement of the E-Government Act," which allows fees "only to recover the direct cost of distributing documents via PACER"—not unrelated projects that "should be funded through direct appropriations." Taylor Decl., Ex. B.

Because this theory of liability applies equally to everyone who has paid a PACER fee within the six-year limitations period, the plaintiffs move to certify the case as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class: "All individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government."

BACKGROUND

PACER is a system that provides online access to federal judicial records and is managed by the Administrative Office of the U.S. Courts (or AO). The AO has designed the system so that, before accessing a particular record, a person must first agree to pay a specific fee, shown on the computer screen, which says: "To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser." Here is an example of what the person sees on the screen:

To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser.

Pacer Service Center			
Transaction Receipt			
Mon May 2 09:27:00 2016			
Pacer Login:		**Client Code:**	
Description:	Image1-0	**Case Number:**	1:16-cv-00745-ESH
Billable Pages:	15	**Cost:**	1.50

View Document

The current PACER fee is set at $.10 per page (with a maximum of $3.00 per record) and $2.40 per audio file. Only if the person affirmatively agrees to pay the fee will a PDF of the record appear. Unless that person obtains a fee waiver or incurs less than $15 in PACER charges in a given quarter, he or she will incur an obligation to pay the fees.

Each of the named plaintiffs here—the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice—has repeatedly incurred fees to access court records through the PACER system.

Congress authorizes fees "to reimburse" PACER expenses. This system stretches back to the early 1990s, when Congress began requiring the judiciary to charge "reasonable fees" for access to records. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress sought to limit the fees to the cost of providing the records: "All fees hereafter collected by the Judiciary . . . *as a charge for services rendered*

shall be deposited as offsetting collections . . . *to reimburse expenses incurred in providing these services*." *Id.* (emphasis added). The AO set the fees at $.07 per page in 1998. *See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program, http://1.usa.gov/1lrrM78.

It soon became clear that this amount was far more than necessary to recover the cost of providing access to records. But rather than reduce the rate to cover only the costs incurred, the AO instead used the extra revenue to subsidize other information-technology-related projects.

The AO begins using excess PACER fees to fund ECF. The expansion began in 1997, when the judiciary started planning for a new e-filing system called ECF. The AO produced an internal report discussing how the system would be funded. It emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." AO, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead* (discussion draft), at 34 (Mar. 1997), http://bit.ly/1Y3zrX0. Yet, just two pages later, the AO contemplated that ECF could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36. The AO did not offer any statutory authority to support this view.

Congress responds by passing the E-Government Act of 2002. When Congress revisited the subject of PACER fees a few years later, it did not relax the requirement that the fees be limited to the cost of providing access to records. To the contrary, it amended the statute to *strengthen* this requirement. Recognizing that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information," Congress amended the law "to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this

information is freely available to the greatest extent possible." S. Rep. No. 107–174, 107th Cong., 2d Sess. 23 (2002).

The result was a provision of the E-Government Act of 2002 that amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 28 U.S.C. § 1913 note). The full text of the statute is thus as follows:

> **(a)** The Judicial Conference may, *only to the extent necessary*, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections *for access to information available through automatic data processing equipment*. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> **(b)** The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) *as a charge for services rendered* shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphasis added).

Even after the E-Government Act, the AO increases PACER fees. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Memorandum from AO Director Leonidas Ralph Mecham to Chief Judges and Clerks (Oct. 21, 2004). To justify this increase, the AO did not point to any growing costs of providing access to records through PACER. It relied instead on the fact that the judiciary's information-technology fund—the account into which PACER fees and other funds (including appropriations) are

deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. *Id.* As before, the AO cited no statutory authority for this increase.

The AO finds new ways to spend extra PACER fees as they keep growing. By the end of 2006, the judiciary's information-technology fund had accumulated a surplus of nearly $150 million—at least $32 million of which was from PACER fees. AO, *Judiciary Information Technology Annual Report for Fiscal Year 2006*, at 8, http://bit.ly/1V5B9p2. But once again, the AO declined to reduce or eliminate PACER fees. It instead sought out new ways to spend the excess, using it to cover "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance"—services that relate to those provided by PACER only in the sense that they too concern technology and the courts. Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins (Mar. 25, 2010)).

Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House. She admitted that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements . . . , thereby reducing our need for appropriated funds." *Id.*

The E-Government Act's sponsor says that the AO is violating the law. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the law. Taylor Decl., Ex. B (Letter from Sen. Lieberman to Hon. Lee Rosenthal (Feb. 27, 2009)). He noted that the Act's "goal" was "to increase free public access to [judicial] records," yet "PACER [is] charging a higher rate" than it did when the law was passed.

Id. Importantly, he explained, "the funds generated by these fees are still well higher than the cost of dissemination." *Id.* Invoking the key statutory text, he asked the judiciary to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." *Id.*

The Judicial Conference replied with a letter defending the AO's position that it may use PACER fees to recoup non-PACER-related costs. The letter acknowledged that the Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" Letter from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009). Yet the letter claimed that Congress has "expand[ed] the permissible use of the fee revenue to pay for other services," *id.*—even though it actually did the opposite, enacting the E-Government Act specifically to limit any fees to those "necessary" to "reimburse expenses incurred" in providing the records. 28 U.S.C. § 1913 note. The sole support that the AO offered for its view was a sentence in a conference report accompanying the 2004 appropriations bill, which said that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." Letter from Rosenthal and Duff to Sen. Lieberman. The letter did not provide any support (even from a committee report) for using fees to recover non-PACER-related expenses beyond ECF.

Later, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins). "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up." *Id.* It has done so because the AO uses the fees to fund "initiatives that are unrelated to providing public access via PACER." *Id.* He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to

recover the direct cost of distributing documents via PACER." *Id.* Other technology-related projects, he stressed, "should be funded through direct appropriations." *Id.*

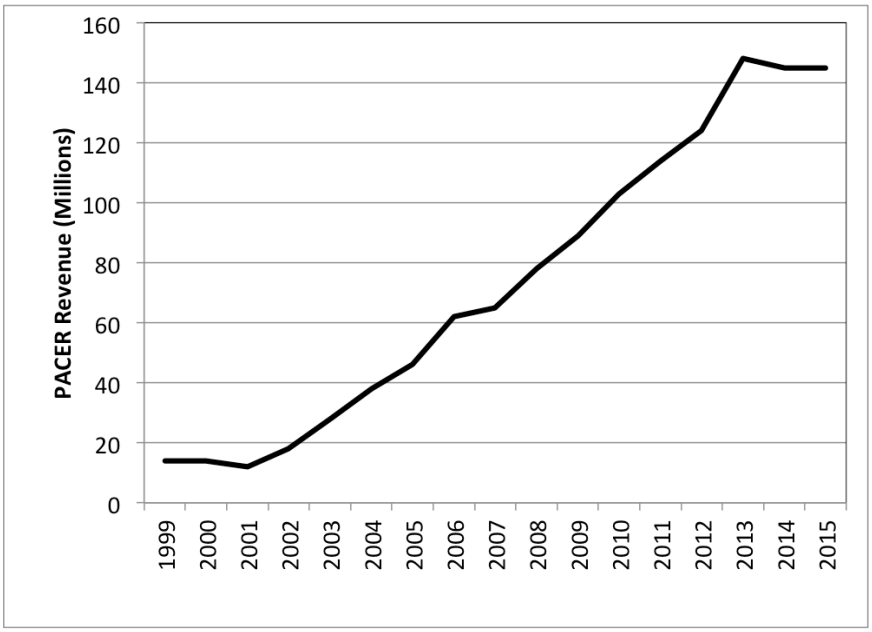
The AO again increases PACER fees. The AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the [ECF] system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." AO, *Electronic Public Access Program Summary* 1 (2012), http://1.usa.gov/1Ryavr0. But the AO believed that the fees comply with the E-Government Act because they "are only used for public access." *Id.* at 10. It did not elaborate.

Subsequent congressional budget summaries, however, indicate that the PACER revenue at that time was more than enough to cover the costs of providing the service. The judiciary reported that in 2012, of the money generated from "Electronic Public Access Receipts," it spent just $12.1 million on "public access services," while spending more than $28.9 million on courtroom technology. *The Judiciary: Fiscal Year 2014 Congressional Budget Summary*, App. 2.4.

The AO continues to charge fees that exceed the cost of PACER. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees and to use these fees to fund activities beyond providing access to records. In 2014, for example, the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes, like courtroom technology, websites for jurors, and bankruptcy-notification systems. AO, *The Judiciary Fiscal Year 2016 Congressional Budget Summary* 12.2, App. 2.4 (Feb. 2015).

The chart on the following page—based entirely on data from the published version of the judiciary's annual budget, *see* Taylor Decl. ¶ 3—illustrates the rapid growth in PACER revenue over the past two decades, a period when "technological innovations," including

exponentially cheaper data storage, "should have led to reduced costs." Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins).



For much of this period, the judiciary projected that the annual cost of running the program would remain well under $30 million. AO, *Long Range Plan for Information Technology in the Federal Judiciary: Fiscal Year 2009 Update* 16 (2009).

Some members of the federal judiciary have been open about the use of PACER revenue to cover unrelated expenses. When questioned during a 2014 House appropriations hearing, representatives from the judiciary admitted that the "Electronic Public Access Program encompasses more than just offering real-time access to electronic records." *Fin. Servs. and General Gov. Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014).[1] And Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has acknowledged that the fees "also go to funding

[1] As a percentage of the judiciary's total budget, however, PACER fees are quite small. Based on the judiciary's budget request of $7.533 billion for fiscal year 2016, PACER fees make up less than 2% of the total budget—meaning that the excess fees are a fraction of a fraction. Matthew E. Glassman, *Judiciary Appropriations FY2016*, at 1 (June 18, 2015), http://bit.ly/1QF8enE.

courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat-screen monitor. . . . [There have also been] audio enhancements. . . . This all ties together and it's funded through these [PACER] fees." Panel Discussion, William and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), bit.ly/1PmR0LJ.

ARGUMENT

I. This Court has jurisdiction over the claims of all class members.

Before certifying the class, the Court must first assure itself that it has subject-matter jurisdiction over the claims of all class members. The basis for jurisdiction here is the Little Tucker Act, which waives the federal government's sovereign immunity and "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1348 (Fed. Cir. 2005) (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996)). Courts have long recognized such illegal-exaction claims—claims that money was "improperly paid, exacted, or taken from the claimant" in violation of a statute, *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)—regardless of whether the statute itself creates an express cause of action.

By its terms, the Little Tucker Act grants district courts "original jurisdiction, concurrent with the United States Court of Federal Claims," over any non-tort, non-tax "claim against the United States, not exceeding $10,000," 28 U.S.C. § 1346(a)(2), while vesting exclusive appellate jurisdiction in the Federal Circuit, *id.* § 1295(a). This means that the Federal Circuit's interpretation of the Act is binding on district courts. And the Federal Circuit has made clear that, in a class action, "there will be no aggregation of claims" for purposes of assessing the $10,000 limit. *Chula Vista City Sch. Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987).

The Federal Circuit has also made clear that the Little Tucker Act does not require that each plaintiff's total *recovery* be $10,000 or less. Quite the contrary: Federal Circuit precedent holds that even a single plaintiff seeking millions of dollars may bring suit in federal district court under the Little Tucker Act if the total amount sought represents the accumulation of many separate transactions, each of which gives rise to a separate claim that does not itself exceed $10,000. *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993).

In the 1990s, airline companies brought two lawsuits in this district seeking to recover what they claimed were illegal exactions by the government. In one case, the General Services Administration (or GSA) deducted roughly $100 million from future payments it owed the airlines after determining that it had overpaid for plane tickets. *Alaska Airlines v. Austin*, 801 F. Supp. 760 (D.D.C. 1992). In the other, GSA "withheld future payments to the airlines to offset" the costs of tickets that were never used. *Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 74 (D.D.C. 1991). The airlines claimed that GSA was "recouping alleged overcharges from them in violation of the law," and sought "return of the funds" that had "been assessed against them unlawfully." *Alaska Airlines*, 801 F. Supp. at 761.

In both cases, the court recognized that each airline was seeking well over $10,000, but determined that the total amount each plaintiff sought "represents the accumulation of disputes over alleged overcharges on thousands of individual tickets." *Id.* at 762. Thus, the court held that the asserted overcharge for each individual ticket constituted its own claim under the Little Tucker Act—even though the airlines paid numerous overcharges at a time through GSA's withholdings, and even though each case presented one "straightforward" legal question. *Id.* Because "[e]ach contested overcharge is based on a single ticket and is for less than $10,000," the district court had jurisdiction. *Id.*; *see Am. Airlines*, 778 F. Supp. at 76. The court explained that "[t]he Government cannot escape [Little Tucker Act] jurisdiction by taking a lump sum offset

that totals over $10,000 and then alleging that the claims should be aggregated." *Id.* On appeal, the Federal Circuit agreed, holding that "the district court had concurrent jurisdiction with the Court of Federal Claims." *Alaska Airlines*, 8 F.3d at 797.

Under this binding precedent, each transaction to access a record through PACER in exchange for a certain fee—a fee alleged to be excessive, in violation of the E-Government Act—constitutes a separate claim under the Little Tucker Act. As a result, each class member has multiple individual illegal-exaction claims, none of which exceeds $10,000. Even if a very small percentage of class members might ultimately receive more than $10,000, that amount "represents the accumulation of disputes over alleged overcharges on thousands of individual [transactions]"; it is no bar to this Court's jurisdiction. *Alaska Airlines*, 801 F. Supp. at 762.

Nor does the Little Tucker Act's venue provision pose a barrier to certifying the class here. Although it requires that individual actions be brought "in the judicial district where the plaintiff resides," 28 U.S.C. § 1402(a)(1), it does not alter the general rule in class actions that absent class members "need not satisfy the applicable venue requirements," *Briggs v. Army & Air Force Exch. Serv.*, No. 07–05760, 2009 WL 113387, *6 (N.D. Cal. 2009); *see also Whittington v. United States*, 240 F.R.D. 344, 349 (S.D. Tex. 2006); *Bywaters v. United States*, 196 F.R.D. 458, 463–64 (E.D. Tex. 2000).

Were the law otherwise, the Little Tucker Act would preclude nationwide class actions, instead requiring nearly a hundred mini class actions, one in each federal district, to remedy a widespread, uniform wrong committed by the federal government. That extreme result "simply is not to be found in the text of the Act itself," and "the venue provision would be an awkward vehicle by which to effectuate any anti-class policy." *Briggs*, 2009 WL 113387, at *7. This Court thus has the authority to certify the class if it meets the requirements of Rule 23.

II. This Court should certify the class under Rule 23.

Class certification is appropriate where, as here, the plaintiffs can satisfy the requirements of both Rule 23(a) and (b). Rule 23(a) requires a showing that (1) the class is sufficiently numerous to make joinder of all class members impracticable, (2) there are common factual or legal issues, (3) the named plaintiffs' claims are typical of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class.

Rule 23(b) requires one of three things. Under subsection (b)(1), the plaintiffs may show that prosecuting separate actions would create a risk of inconsistent results, such as where the defendant is "obliged by law to treat the members of the class alike." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Under (b)(2), the plaintiffs may show that the defendant "has acted or refused to act on grounds that apply generally to the class," such that declaratory or injunctive relief is appropriate. And under (b)(3), the plaintiffs may show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The class in this case satisfies both (b)(1) and (b)(3).

A. This case meets Rule 23(a)'s requirements.

1. The class is sufficiently numerous.

To begin, this case satisfies Rule 23(a)(1)'s requirement that the class be "so numerous that joinder of all members is impracticable." "Courts in this District have generally found that the numerosity requirement is satisfied and that joinder is impracticable where a proposed class has at least forty members," *Cohen v. Warner Chilcott Public Ltd. Co.*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007), and a plaintiff need not "provide an exact number of putative class members in order to satisfy the numerosity requirement," *Pigford v. Glickman*, 182 F.R.D. 341, 347 (D.D.C. 1998); *see Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 305–06 (D.D.C. 2007)

(certifying class of 30 people). Although the plaintiffs do not have access to the defendant's records, and so cannot yet know exactly how many people have paid PACER fees in the past six years, they estimate that the class contains at least several hundred thousand class members. According to documents prepared by the judiciary and submitted to Congress, there are nearly two million PACER accounts, "approximately one-third" of which "are active in a given year." *The Judiciary: Fiscal Year 2016 Congressional Budget Justification*, App. 2.1. Making even the most generous assumptions about how many of these people receive fee waivers or have never incurred more than $15 in charges in a given quarter (and thus have never paid a fee), there can be no serious dispute that this class satisfies Rule 23(a)(1).

2. The legal and factual issues are common to the class.

This case likewise easily satisfies Rule 23(a)(2)'s requirement of "questions of law or fact common to the class." This requirement is met if "[e]ven a single common question" exists, *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145 (D.D.C. 2014) (Huvelle, J.), so long as "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Here, the two most important questions in the case are common: (1) Are the fees imposed for PACER access excessive in relation to the cost of providing the access—that is, are the fees higher than "necessary" to "reimburse expenses incurred in providing the[] services" for which they are "charge[d]"? 28 U.S.C. § 1913 note; and (2) what is the measure of damages for the excessive fees charged? *See* Compl. ¶ 29. These questions "will generate common answers for the entire class and resolve issues that are central (and potentially dispositive) to the validity of each plaintiff's claim and the claims of the class as a whole." *Thorpe*, 303 F.R.D. at 146–47.

3. The named plaintiffs' claims are typical of the class.

This case also meets Rule 23(a)(3)'s requirement that the named plaintiffs' claims be typical of the class's claims, a requirement that is "liberally construed." *Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003). When "the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Id.* at 35. That is the case here. The named plaintiffs' claims are typical of the class because they arise from the same course of conduct by the United States (imposing a uniform PACER fee schedule that is higher than necessary to reimburse the cost of providing the service) and are based on the same legal theory (challenging the fees as excessive, in violation of the E-Government Act). *See* Compl. ¶ 30.

4. The named plaintiffs are adequate representatives.

Rule 23(a)(4) asks whether the named plaintiffs "will fairly and adequately protect the interests of the class," an inquiry that "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. It has two elements: "(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997); *Thorpe*, 303 F.R.D. at 150. Both are met here.

a. The named plaintiffs. The plaintiffs are three of the nation's leading nonprofit legal advocacy organizations: the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice. Compl. ¶¶ 1–3. They all care deeply about "preserv[ing] unfettered access to the courts," *id.* ¶ 3, and brought this suit to vindicate

Congress's goal in passing the E-Government Act: to ensure that court records are "freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002).

Since 1980, the National Veterans Legal Services Program has represented thousands of veterans in individual court cases, and has worked to ensure that our nation's 25 million veterans and active-duty personnel receive all benefits to which they are entitled for disabilities resulting from their military service. Compl. ¶ 1. Excessive PACER fees impede this mission in numerous ways—including by making it difficult to analyze patterns in veterans' cases, and thus to detect pervasive problems and delays. The organization is concerned that the fees have not only hindered individual veterans' ability to handle their own cases, but have also "inhibited public understanding of the courts and thwarted equal access to justice." *Id.* at 2.

The excessive fees likewise impede access to justice for low-income consumers—like those waging legal battles to try to save their homes from foreclosure—which is why the National Consumer Law Center also brought this suit. The Law Center conducts a wide variety of research, litigation, and other activities on behalf of elderly and low-income consumers, and publishes 20 different treatises that comprehensively report on the development of consumer law in the courts. *Id.* ¶ 2. The organization has incurred PACER fees in carrying out all of these activities, *id.*, and is also concerned about the many *pro se* consumers whose interaction with the judicial system has been made far more difficult by the PACER fee structure.

Finally, the Alliance for Justice is a national association of over 100 public-interest organizations—such as the National Center on Poverty Law and the National Legal Aid & Defender Association—nearly all of whom are affected by excess PACER fees. *Id.* ¶ 3. These organizations also strongly support the judiciary's efforts to obtain whatever resources it needs. They do not aim to deplete the judiciary's budget, nor do they object to the judiciary's quest for

increased funding. All they object to is using excess PACER fees to fund unrelated projects that "should be funded through direct appropriations." Letter from Sen. Lieberman to Rosenthal.

Because excess PACER fees are unlawful and significantly impede public access (and yet make up only a fraction of a fraction of the judiciary's budget, as explained in footnote 1), the named plaintiffs will vigorously prosecute this case on behalf of themselves and all absent class members. Each named plaintiff has paid numerous PACER fees in the past six years, and each has the same interests as the unnamed class members. Compl. ¶ 31. And the relief the plaintiffs are seeking—a full refund of excess fees charged within the limitations period, plus a declaration that the fees violate the E-Government Act—would plainly "be desired by the rest of the class." *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 446 (D.D.C. 2002) (Huvelle, J.).

b. Class counsel. Proposed co-lead class counsel are Gupta Wessler PLLC, a national boutique based in Washington that specializes in Supreme Court, appellate, and complex litigation; and Motley Rice LLC, one of the nation's largest and most well-respected class-action firms. The firms will also consult with two lawyers with relevant expertise: Michael Kirkpatrick of Georgetown Law's Institute for Public Representation and Brian Wolfman of Stanford Law School. Together, these law firms and lawyers have a wealth of relevant experience.

One of the two co-lead firms, Gupta Wessler, has distinctive experience with class actions against the federal government. Two of its lawyers, Deepak Gupta and Jonathan Taylor, represent a certified class of federal bankruptcy judges and their beneficiaries in a suit concerning judicial compensation, recently obtaining a judgment of more than $56 million. *See* Gupta Decl. ¶¶ 1, 4–8; *Houser v. United States*, No. 13-607 (Fed. Cl.). Mr. Gupta and Mr. Taylor both received the President's Award from the National Conference of Bankruptcy Judges for their work on the case. Gupta Decl. ¶ 8. Just over a month ago, the *American Lawyer* reported on the firm's work, observing that "[i]t's hard to imagine a higher compliment than being hired to represent federal

judges" in this important class-action litigation. *Id.* Mr. Gupta and Mr. Taylor also currently represent (along with Motley Rice) a certified class of tax-return preparers seeking the recovery of unlawful fees paid to the IRS. *See id.* ¶¶ 1, 9–10; *Steele v. United States*, No. 14-1523 (D.D.C.). And Mr. Gupta, who worked at the Consumer Financial Protection Bureau and Public Citizen Litigation Group before founding the firm, has successfully represented a certified class of veterans challenging the government's illegal withholding of federal benefits to collect old debts arising out of purchases of military uniforms, recovering about $7.4 million in illegal charges. Gupta Decl. ¶¶ 1, 13–16.

The other co-lead firm, Motley Rice, regularly handles class actions and complex litigation in jurisdictions across the U.S., and currently serves as lead or co-lead counsel in over 25 class actions and as a member of the plaintiffs' steering committee in numerous MDL actions. Narwold Decl. ¶ 3. William Narwold, chair of the firm's class-action practice, will play a lead role in prosecuting this case and is also currently class counsel in *Steele v. United States*, the tax-return-preparer case mentioned above. *Id.* ¶¶ 1–3, 6. His colleague Joseph Rice, one of the top class-action and mass-tort-settlement negotiators in American history, will play a lead role in any settlement negotiations. *Id.* ¶ 1. Under their leadership, Motley Rice has secured some of the largest verdicts and settlements in history, in cases involving enormously complex matters. The firm is a member of the plaintiffs' steering committee in the *BP Deepwater Horizon Oil Spill Litigation*, where Mr. Rice served as one of the two lead negotiators in reaching settlements. One of those settlements, estimated to pay out between $7.8 billion and $18 billion to class members, is the largest civil class-action settlement in U.S. history. *Id.* ¶ 6. The firm also served as co-lead trial counsel on behalf of ten California cities and counties against companies that had concealed the dangers of lead paint. In 2014, after a lengthy bench trial, the court entered judgment in favor of the cities and counties for $1.15 billion. *Id.*

B. This case meets Rule 23(b)'s requirements.

1. This case satisfies Rule 23(b)(1).

Rule 23(b)(1) permits class certification if prosecuting separate actions by individual class members would risk "inconsistent or varying adjudications" establishing "incompatible standards of conduct" for the defendant. Because this case seeks equitable relief in addition to return of the excessive PACER fees already paid, the risk of inconsistent results is acute. If there were separate actions for equitable relief, the AO could be "forced into a 'conflicted position,'" Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 388 (1967), potentially subjecting it to "incompatible court orders," 2 William B. Rubenstein, *Newberg on Class Actions* § 4.2 (5th ed. 2015). That makes this case the rare one in which a class action is "not only preferable but essential." Rubenstein, *Newberg on Class Actions* § 4.2; *see also* Fed. R. Civ. P. 23(b)(1), 1966 advisory committee note (listing as examples cases against the government "to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment"). Under these circumstances, Rule 23(b)(1) is satisfied.

2. This case satisfies Rule 23(b)(3).

Because this case seeks the return of all excessive PACER fees paid in the last six years, however, the most appropriate basis for certification is Rule 23(b)(3). *See Dukes*, 563 U.S. at 362 ("[I]ndividualized monetary claims belong in Rule 23(b)(3)."). Rule 23(b)(3) contains two requirements, predominance and superiority, both of which are met here.

"The first requirement is that common factual and legal issues predominate over any such issues that affect only individual class members." *Bynum*, 214 F.R.D. at 39. As already explained, the plaintiffs allege that the AO lacks the authority to charge (and in fact charges) PACER fees that exceed the costs of providing the service. The central argument is that the E-

Government Act unambiguously limits any PACER fees "charge[d] for services rendered" to those "necessary" to "reimburse expenses in providing these services"—a limit the AO has failed to heed. 28 U.S.C. § 1913 note. And even if this language were somehow ambiguous, the background rule of administrative law is that user fees may not exceed the cost of the service provided (because then they would become taxes) unless Congress "indicate[d] clearly" an "intention to delegate" its taxing authority. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989). The plaintiffs might prevail on their theory; they might not. But either way, these are the common predominant legal questions in this case.

The sole individual issue—calculation of the amount of each class member's recovery, which depends on how many PACER fees they have paid—is ministerial, and hence cannot defeat predominance. The government's "own records . . . reflect the monetary amount that each plaintiff" has paid in fees over the past six years. *Hardy v. District of Columbia*, 283 F.R.D. 20, 28 (D.D.C. 2012). Once the total excess amount is calculated and the measure of damages is determined (both common questions), divvying up the excess on a pro rata basis would "clearly be a mechanical task." *Id.*

"The second requirement of Rule 23(b)(3) is that the Court find that maintaining the present action as a class action will be superior to other available methods of adjudication." *Bynum*, 214 F.R.D. at 40. This requirement, too, presents no obstacle here. Class treatment is most appropriate in cases like this one, "in which the individual claims of many of the putative class members are so small that it would not be economically efficient for them to maintain individual suits." *Id.* The vast majority of class members "stand to recover only a small amount of damages," making it difficult to "entice many attorneys into filing such separate actions." *Id.* Nor are there any concerns that "potential difficulties in identifying the class members and sending them notice will make the class unmanageable." *Id.* To the contrary, this class is manageable

because the government itself has all the information needed to identify and notify every class member, including their names and email addresses. Class counsel can send notice to the email addresses the PACER Service Center has on file for everyone who has paid a fee.

III. The Court should approve class counsel's notice proposal.

As required by Local Civil Rule 23.1(c), we propose the following class-notice plan, as reflected in the proposed order filed with this motion. First, we propose that class counsel retain a national, reputable class-action-administration firm to provide class notice. Second, to the extent possible, we propose that email notice be sent to each class member using the contact information maintained by the government for each person or entity who has paid PACER fees over the past six years. Third, we propose that if the PACER Service Center does not have an email address on file for someone, or if follow-up notice is required, notice then be sent via U.S. mail. Class counsel would pay all costs incurred to send the notice, and all responses would go to the class-action-administration firm. We respectfully request that the Court direct the parties to file an agreed-upon proposed form of notice (or, if the parties cannot agree, separate forms of notice) within 30 days of the Court's certification order, and direct that email notice be sent to the class within 90 days of the Court's approval of a form of notice.

Because the government has yet to enter an appearance, we were unable to confer with opposing counsel under Local Civil Rule 7(m) regarding the notice proposal or this motion. We are filing the motion now to toll the limitations period for the class, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and to ensure that class certification is decided at the outset, *cf.* Fed. R. Civ. P. 23 (class certification must be decided "[a]t an early practicable time after a person sues"); Local Civil Rule 23(b) (requiring motion to be filed "[w]ithin 90 days after the filing of a complaint in a case sought to be maintained as a class action"). We intend to confer with opposing counsel as soon as they make their appearance.

CONCLUSION

The plaintiffs' motion for class certification should be granted.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007
Phone: (202) 232-5504
Fax: (202) 232-5513
bnarwold@motleyrice.com

MICHAEL T. KIRKPATRICK (D.C. Bar No. 486293)
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
Phone: (202) 662-9535
Fax: (202) 662-9634
michael.kirkpatrick@law.georgetown.edu

Attorneys for Plaintiffs

May 2, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant hereby moves, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), to dismiss this action for failure to state a claim within this Court's jurisdiction and under the "first-to-file" rule. In the alternative, Defendant moves for summary judgment in its favor, pursuant to Fed. R. Civ. P. 56, because there is no genuine issue as to any material fact and the Defendant is entitled to judgment as a matter of law.

The Court is respectfully referred to the accompanying

memorandum, declarations and statement of material facts which accompany this motion.

Respectfully submitted,

CHANNING D. PHILLIPS, DC Bar #415793
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This is the third recent civil action instituted as a class action challenging the fees charged by the Administrative Office of United States Courts ("AO") on the theory that it has overcharged for access to information made available through its Public Access to Court Electronic Records ("PACER") system. See Complaint at 2, fn.1; Fisher v. United States, U.S. Court of Federal Claims Case No. 1:15-cv-01575-TCW; Fisher v. Duff, Case No. C15-5944 BHS (W.D. Wash).[1] Accordingly, it should be dismissed under the first-to-file rule. In any event, a prerequisite to an action challenging PACER

[1] On December 28, 2015, Bryndon Fisher ("Fisher") filed a class action complaint against the United States in the Court of Federal Claims ("CFC Complaint"). See June 15, 2016 Order in Fisher v. Duff, Case No. C15-5944 BHS (W.D. Wash) (Exhibit 5) at 1. In the June 15, 2016 Order, the earlier District Court action was dismissed based upon the first-to-file rule, because the district court action was filed after the CFC Complaint and the putative class members could obtain relief in the Court of Federal Claims suit. Id.

fees is the requirement that the entity billed for such fees has, within 90-days of the date of the PACER bill, alerted the PACER Service Center to any errors in billing. See Declaration of Anna Marie Garcia. Docket No. 18 in Fisher v. Duff (Exhibit 1), ¶¶ 3-4. As Plaintiffs do not allege that they have satisfied this contractual obligation, the action should be dismissed for failure to state a claim. At a minimum, the claims should be limited to those plaintiffs who have timely but unsuccessfully attempted to resolve the alleged overbilling by alerting the PACER Service Center, as required.[2]

BACKGROUND

PACER is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. See Complaint (ECF No. 1), ¶ 7-8; https://www.pacer.gov/. "PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service." Id. To that end, PACER allows users to access Court documents for $0.10 per page, up to a maximum charge of $3.00 per

[2] Moreover, the Plaintiff class members would have to exclude those PACER users whose downloads exceeded the $3.00 maximum download charge sufficiently to reduce the per page charge to that deemed acceptable to Plaintiffs.

transaction; and PACER fees are waived if a user does not exceed $15 in a quarter. Id. (Exhibit 4) at 2; Complaint, ¶ 73.

The terms provided to all PACER users during the registration process include a requirement that users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." https://www.pacer.gov/documents/pacer_policy.pdf (PACER Policies). Similarly, the PACER User Manual states, "If you think there is an error on your bill, you must submit the Credit Request Form. Requests may also be faxed to the PACER Service Center. . ." https://www.pacer.gov/documents/pacermanual.pdf (PACER User Manual) at 5. The Credit Request Form requires users to "Complete this form and submit it along with a letter of explanation in support of the credit request." It also requires users to provide a "detailed explanation in support of the request for credit," a "list of transactions in question" and a "completed refund request form if payment has been made on the account." Plaintiff does not allege that he, or any other member of the purported class, submitted any claim to the PACER Service Center for the overcharges he alleges in his complaint.

On December 28, 2015, Bryndon Fisher instituted a purported class action against the United States based on allegations that he was overcharged by the AO for downloading certain documents from

PACER. Docket No. 1 in Fisher v. United States, (Exhibit 2), ¶¶ 1-5, 37-45. On May 12, 2016, Mr. Fisher filed an amended Complaint in the case, but still pursues class action claims that he and the class he represents (PACER users) were overcharged by the AO and that the fees were not in compliance with the limitations placed on fees by the Judicial Appropriations Act of 1992, Pub. L. 102–140, title III, § 303, 105 Stat. 810 (1991), and the E-Government Act of 2002, Pub. L. 107–347, title II, § 205(e), 116 Stat. 2915 (2002). Docket No. 8 (Amended Complaint) in Fisher v. United States, (Exhibit 3) ¶¶ 14-16.[3]

Based on what Plaintiffs in the instant action allege are PACER overcharges, Plaintiffs similarly assert class action claims for illegal exaction, on one of the theories shared in the Fisher litigation. Plaintiffs here, like those in Fisher, similarly assert that the fees charged through PACER are in excess of those authorized by the E-Government Act of 2002 and its limitation allowing fees "only to the extent necessary." Complaint, ¶¶ 11-12, 27-29, 33-34;

[3] According to the Amended Complaint in Fisher v. United States, "Congress expressly limited the AO's ability to charge user fees for access to electronic court information by substituting the phrase "only to the extent necessary" in place of "shall hereafter" in the above statute. E-Government Act of 2002, § 205(e). Exhibit 3, ¶ 16.

Exhibit 3, ¶¶ 15, 29-41, 45(E).[4] The purported class of users in Fisher v. United States, consists of "All PACER users who, from December 28, 2009 through present, accessed a U.S. District Court, U.S. Bankruptcy Court, of the U.S. Court of Federal Claims and were charged for at least one docket report in HTML format that included a case caption containing 850 or more characters." Exhibit 3, ¶ 41. In the instant action, Plaintiffs seek to certify a class of "All individuals and entities who have paid for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." Complaint, ¶ 27. Thus, the class in this action would encompass all Plaintiffs in Fisher.

ARGUMENT

Standard Of Review

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. 131, 136-137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986), which

[4] Paragraph 45(E)-(F) of the Amended Complaint in Fisher v. United States posits as an issue common to all of the purported class members the following: Whether the AO's conduct constituted an illegal exaction by unnecessarily and unreasonably charging PACER users more than the AO and the Judicial Conference authorized under Electronic Public Access Fee Schedule and the E-Government Act of 2002; [and] Whether Plaintiff and the Class have been damaged by the wrongs alleged and are entitled to compensatory damages." Exhibit 3, ¶ 45(E)-(F).

> is not to be expanded by judicial decree, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. Bank of North America, America, 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799), and the burden of establishing the contrary rests upon the party party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183, 56 S.Ct. 780, 782, 80 L.Ed. 1135 (1936).

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be presented as a facial or factual challenge. "A facial challenge attacks the factual allegations of the complaint that are contained on the face of the complaint, while a factual challenge is addressed to the underlying facts contained in the complaint." Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (internal quotations and citations omitted.) When defendants make a facial challenge, the the district court must accept the allegations contained in the complaint as true and consider the factual allegations in the light most favorable to the non-moving party. Erby v. United States, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). With respect to a factual challenge, the district court may consider materials outside of the pleadings to determine whether it has subject matter jurisdiction over the claims. Jerome Stevens Pharmacy, Inc. v. FDA, 402 F.3d 1249, 1249, 1253 (D.C. Cir. 2005). The plaintiff bears the responsibility

of establishing the factual predicates of jurisdiction by a preponderance of evidence. Erby, 424 F. Supp. 2d at 182.

In order to survive a Rule 12(b)(6) motion, the plaintiff must present factual allegations that are sufficiently detailed "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). As with facial challenges to subject-matter jurisdiction under Rule 12(b)(1), a district court is required to deem the factual allegations in the complaint as true and consider those allegations in the light most favorable to the non-moving party when evaluating a motion to dismiss under Rule 12(b)(6). Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006). However, where "a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). Further, a "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 556 U.S. at 679. While "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, [] it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 678-79. Finally,

Finally, as a general matter, the Court is not to consider matters outside the pleadings, per Rule 12(b), without converting a defendant's motion to a motion for summary judgment. In interpreting interpreting the scope of this limitation, however, the D.C. Circuit has instructed that the Court may also consider "any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice." EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 624 (D.C. Cir. 1997). For example, the D.C. Circuit has approved judicial notice of public records on file. In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (statements attached to complaint that undermined inference advocated by plaintiff). Defendant specifically asks that the Court take judicial notice of the documents accompanying this filing. See Fed. R. Evid. 201.

Summary judgment is appropriate when, as here, the pleadings, together with the declarations, demonstrate that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Washington Post Co. v. U.S. Dept. of Health and Human Services, 865 F.2d 320, 325 (D.C. Cir. 1989). As the Supreme Court has declared, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every

action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary Summary judgment is appropriate, under Rule 56, if the pleadings on file, as well as the affidavits submitted, evidence that there is no genuine issue of any material fact and that movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Mendoza Mendoza v. Drug Enforcement Admin., 465 F.Supp.2d 5 (D.D.C. 2006).

Courts are required to view the facts and inferences in a light most favorable to the non-moving party. See Flythe v. District of Columbia, 791 F.3d 13, 19 (D.C. Cir. 2015)(citing Scott v. Harris, 550 U.S. 372, 383 (2007). However, the party opposing the motion cannot simply "rest upon the mere allegations or denials of the adverse party's pleading, but. . . must set forth specific facts showing that there is a genuine issue for trial." Mendoza, 465 F.Supp.2d at 9 (quoting Fed R. Civ. P. 56(e). A non-moving party must show more than "that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

In Neal v. Kelly, 963 F.2d 453 (D.C. Cir. 1992), the Court recognized that "any factual assertions in the movants affidavits will be accepted as being true unless [the opposing party] submits his own affidavits or other documentary evidence contradicting the assertion." Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Since the Court is constrained to "treat the complaint's factual allegations as true", Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000), the facts alleged in the Complaint "must be enough to raise a right to relief above the speculative level." Schuer v. Rhodes, 416 U.S. 232, 236 (1974).

Finally, where the District Court has employed the first-to-file rule, its action has been reviewed on appeal only for abuse of discretion. See Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) (judge acted within his discretion when he dismissed the action).

First-To-File

Where two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first. Food Fair Stores v. Square Deal Mkt. Co., 187 F.2d 219, 220-21 (D.C. Cir. 1951). Relying on principles of comity, the Court of Appeals has affirmed that a District Court acts within its discretion when it dismisses an action under the "first-to-file rule." Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d at 830-31.

Just as was the case in Fisher v. Duff, the claims here overlap with those in the Claims court litigation. Both cases involve allegations that the same entities utilized the PACER system and were charged more for downloading information than is authorized by the same statutes and agreements. The class here would include nearly every class member in Fisher,[5] and the Fisher litigation was filed first, on December 28, 2015. Accordingly, this action should be dismissed to allow the Claims Court litigation to proceed. See Docket No. 25 in Fisher v. Duff (Exhibit 5); Food Fair Stores v. Square Deal Mkt. Co., 187 F.2d at 220-21; Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d at 830-31.

Plaintiffs Do Not Allege They Timely Alerted The PACER Service Center

Under their agreements with the Defendant, the Plaintiffs, when using PACER, agree that if there is an error in the user's PACER bill, the user "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." Exhibit 1, ¶ 3. Essentially, the submission of claims to the PACER Service Center

[5] Plaintiffs' Motion For Class Certification recognizes that the class would be limited to those charged within the six-year limitations period. ECF No. 8 at 1; Complaint at 15 (limiting the demanded monetary recovery to "the past six years that are found to exceed the amount authorized by law"). Thus, the class would exclude those whose PACER fees were charged before April 21, 2010. The limitations period in Fisher v. United States would presumably go back six years from the filing of the original complaint on December 28, 2015, an extra few months.

is, by the plain terms of the agreement between Plaintiffs and the Defendant, a condition precedent to any duty to refund billing errors. See 13 *Williston on Contracts* § 38:7 (4th ed.) ("A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or a contractual duty arises."). Because Plaintiffs have not alleged that this condition precedent was performed, they have not stated a claim for relief.

As with exhaustion of statutory administrative remedies, there are sound policy reasons to require the plaintiffs to fulfill their contractual duty to submit any claim to the PACER Service Center. As the Supreme Court noted in McKart v. United States, such reasons "are not difficult to understand." Id., 395 U.S. 185, 193 (1969). Since agency decisions "frequently require expertise, the agency should be given the first chance to . . . apply that expertise." Id. "And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." Id.; see Thomson Consumer Elecs., Inc. v. United States, 247 F.3d 1210, 1214 (Fed. Cir. 2001) (citing McKart while explaining that administrative remedies are sometimes preferable to litigation because "courts may never have to intervene if the complaining party

is successful in vindicating his rights" and "the agency must be given a chance to discover and correct its own errors.").

Here, the billing errors at issue are clearly a matter of highly specific expertise. If Plaintiffs would fulfil their obligations and submit a claim for a specific alleged overcharge to the PACER Service Center, they could engage in a dialog with those at the PACER Service Center and allow the Defendant to exercise its expertise regarding the workings of the PACER system and respond directly to Plaintiffs' concerns about the accuracy of the PACER bill. Such a result is required by the agreement, and would also be more efficient than testing Plaintiff's theories in Court.

Plaintiffs Have Not Alleged A Statutory Remedy That Supports An Illegal Exaction Claim

> In both the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), Congress has waived sovereign immunity for certain actions for monetary relief against the United States. United States v. Mitchell, 463 U.S. 206, 212–18, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). The pertinent portions of the Tucker Act and the Little Tucker Act waive sovereign immunity for claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1); id. § 1346(a)(2). The Little Tucker Act permits an action to be brought in a district court, but only if a claim does not exceed $10,000 in amount; the Tucker Act contains no such monetary restriction but authorizes actions to be brought only in the Court of Federal Claims.

Doe v. United States, 372 F.3d 1308, 1312 (Fed. Cir. 2004). Because Plaintiff has relied upon the Little Tucker Act for this Court's jurisdiction, Complaint, ¶ 5, any review of the final judgment will likely be in the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(2).

To invoke federal court jurisdiction over an illegal exaction claim, "a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).[6]

Here, Plaintiffs' illegal exaction claim fails because that claim expressly recognizes that the liability comes only after an agreement is reached between the PACER user and the AO. See Complaint, ¶ 7 ("each person must agree to pay a specific fee"). The obligations of those using PACER are further set forth in the PACER User Manual and the policies and procedures promulgated by the AO,

[6] Because the allegation of a proper statute or provision is a jurisdictional issue under the Little Tucker Act, Defendant moves to dismiss the claim under Fed. R. Civ. p. 12(b)(1). Dismissal is also warranted under Fed. R. Civ. P. 12(b)(6), because, even if jurisdiction is present, Plaintiffs have alleged a statutory/regulatory framework that expressly requires his claims to be submitted to the PACER Service Center. See Kipple v. United States, 102 Fed. Cl. 773, 779 (2012).

which form the basis for Plaintiffs' claim that the user consents 'statute or provision' causing the exaction. See Complaint ¶ 7-10; Exhibit 1 (Declaration of Anna Marie Garcia), ¶¶ 2-4. That manual and those regulations, however, require all claims regarding billing errors to be submitted to the PACER Service Center. The complaint does not allege that the plaintiff took the necessary steps to receive a refund: submitting the requisite paperwork to the PACER Service Center. Accordingly, Plaintiffs have failed to allege that the statute and associated regulations provide a remedy for the specific exactions they allege.

Plaintiffs cite the "E-Government Act of 2002, the Electronic Public Access Fee Schedule" as well as other policies and procedures promulgated by the AO in the PACER User Manual to suggest that fees adopted and charged are excessive. See Complaint, ¶ 7-10. They then allege that these laws and regulations resulted in excessive fees. See Complaint, ¶¶ 11-13, 21.[7]

In fact, Plaintiffs' proposed remedy – the return of all monies (regardless of whether claims are presented to the PACER Service Center) – is contrary to the express terms of the governing

[7] In addition, the statutory authority cited by Plaintiffs they expressly recognize that the PACER Service Center is a part of the regulatory framework, by including "PACER Service Center" fees as part of the "the Electronic Public Access Program" See Complaint, ¶ 19.

contractual requirements, namely the AO's policies and procedures and the PACER User Manual. The framework in place expressly limits the monetary remedy to those claims that are submitted to the PACER Service Center within 90 days of the bill. Pacer Policy (users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill"); Pacer User Manual at 5 ("If you think there is an error on your bill, you must submit the Credit Request Form."); Exhibit 1, ¶¶ 2-4.

Plaintiffs' claim is dependent on the inclusion of the PACER User Manual and other AO policies and procedures, including the PACER Policy, because the cited statutory authority states only that the Director of the AO and the Judicial Conference may "prescribe reasonable fees" for PACER information, 28 U.S.C. § 1913, and that those fees are $0.10 per "page" for docket reports, not to exceed thirty pages. 28 U.S.C. §§ 1913, 1914, 1926, 1930, 1932. This language, standing alone, is insufficient to create the remedy of return of all possible claims (including those not submitted to the AO). See Norman, 429 F.3d at 1096 (dismissing claim where law did not "directly result in an exaction").

Instead, the policies and procedures of the AO are a necessary part of the framework supporting Plaintiffs' alleged exaction.

Those same policies and procedures that establish the fees to be paid, however, are fatal to Plaintiffs' exaction claim, because they also require claims to be submitted to the PACER Service Center within 90 days of the date of the bill. Accordingly, Plaintiffs' illegal exaction claim fails.

CONCLUSION

For the foregoing reasons the Complaint should be dismissed or, in the alternative, summary judgment should be granted in favor of the Defendant based both on to the first-to-file rule and as to any claim that was not presented to the PACER Service Center with alleged errors in billing within 90 days of the date of the bill.

Respectfully submitted,

CHANNING D. PHILLIPS, DC Bar #415793
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rule 7(h), the Defendant hereby provides the following statement of material facts as to which there is no genuine dispute:

1. On December 28, 2015, Bryndon Fisher instituted a purported class action against the United States based on allegations that he was overcharged by the AO for downloading certain documents from PACER. Docket No. 1 in Fisher v. United States, (Exhibit 2), ¶¶ 1-5, 37-45.

2. On May 12, 2016, Mr. Fisher filed an amended Complaint in the case, but still pursues class action claims that he and the class he represents (PACER users) were overcharged by the AO and that the fees were not in compliance with the limitations placed on fees by the Judicial Appropriations Act of 1992, Pub. L. 102–140, title III,

§ 303, 105 Stat. 810 (1991), and the E-Government Act of 2002, Pub. L. 107–347, title II, § 205(e), 116 Stat. 2915 (2002). Docket No. 8 (Amended Complaint) in Fisher v. United States, (Exhibit 3) ¶¶ 14-16.

3. According to the Amended Complaint in Fisher v. United States, "Congress expressly limited the AO's ability to charge user fees for access to electronic court information by substituting the phrase "only to the extent necessary" in place of "shall hereafter" in the above statute. E-Government Act of 2002, § 205(e). Exhibit 3, ¶ 16.

4. The purported class of users in Fisher v. United States, consists of "All PACER users who, from December 28, 2009 through present, accessed a U.S. District Court, U.S. Bankruptcy Court, of the U.S. Court of Federal Claims and were charged for at least one docket report in HTML format that included a case caption containing 850 or more characters." Exhibit 3, ¶ 41.

5. Paragraph 45(E)-(F) of the Amended Complaint in Fisher v. United States posits as an issue common to all of the purported class members the following: Whether the AO's conduct constituted an illegal exaction by unnecessarily and unreasonably charging PACER users more than the AO and the Judicial Conference authorized under Electronic Public Access Fee Schedule and the E-Government Act of

2002; [and] Whether Plaintiff and the Class have been damaged by the wrongs alleged and are entitled to compensatory damages." Exhibit 3, ¶ 45(E)-(F).

6. Under their agreements with the Defendant, the Plaintiffs, when using PACER, agree that if there is an error in the user's PACER bill, the user "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." Exhibit 1, ¶ 3.

Respectfully submitted,

CHANNING D. PHILLIPS, DC Bar #415793
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

Having considered defendant's motion to dismiss the complaint or, in the alternative, for summary judgment [ECF No. 11], for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion is **DENIED**.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 5, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

MEMORANDUM OPINION

Plaintiffs, organizations and individuals who have paid fees to obtain records through the Public Access to Court Electronic Records system (PACER), claim that PACER's fee schedule is higher than necessary to cover the costs of operating PACER and therefore violates the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (codified as 28 U.S.C § 1913 note). (Compl. at 2, ECF No. 1.) They have brought this class action suit against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), to recover the allegedly excessive fees that they have paid over the last six years. (*Id.* at 14-15, ¶¶ 33-34.) Defendant has moved to dismiss the suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), claiming that it is barred by the first-to-file rule and does not state a claim within this Court's jurisdiction under the Little Tucker Act. (Def.'s Mot. Dismiss, ECF. No. 11; *see also* Pls.' Opp., ECF No. 15; Def.'s Reply, ECF No. 20.) For the reasons herein, the Court will deny the motion.[1]

[1] Defendant has also moved for summary judgment, but it has not offered any grounds upon which summary judgment should be granted if the motion to dismiss is denied. (*See* Def.'s Mot. at 1, 19.) Therefore, the Court will deny defendant's unsupported motion for summary judgment.

BACKGROUND

According to plaintiffs, "PACER is a decentralized system of electronic judicial-records databases" operated by the Administrative Office for the U.S. Courts ("AO"). (Compl. at 1, ¶ 7.) "Any person may access records through PACER" but "must first agree to pay a specific fee." (*Id.* at ¶ 7.) Congress has authorized the Judicial Conference that it "may, only to the extent necessary, prescribe reasonable fees . . . for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. The fees "shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.*

Plaintiffs allege that the fee was $.07 per page in 1998, with a maximum of $2.10 per request introduced in 2002. (Compl. at ¶ 8.) The AO increased the fee to $.08 per page in 2005 and to $.10 per page in 2012. (*Id.* at ¶¶ 13, 19.) The current fee is $.10 per page, with a maximum of $3.00 per record. (*Id.* at ¶ 7.) Plaintiffs claim that these fees are "far more than necessary to recover the cost of providing access to electronic records." (*Id.* at ¶ 9.) For example, in 2012 the judiciary spent $12.1 million generated from public access receipts on the public access system, while it spent more than $28.9 million of the receipts on courtroom technology. (*Id.* at ¶ 20.) "In 2014 . . . the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems." (*Id.* at ¶ 21.)

Named plaintiffs are nonprofit organizations that have incurred fees for downloading records from PACER. (Compl. at ¶¶ 1-3.) Plaintiff National Veterans Legal Services Program (NVLSP) "has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs." (*Id.* at ¶ 1.) Plaintiff

National Consumer Law Center (NCLC) conducts "policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates." (*Id.* at ¶ 2.) Plaintiff Alliance for Justice (AFJ) "is a national association of over 100 public-interest organizations that focus on a broad array of issues" and "works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans." (*Id.* at ¶ 3.)

Plaintiffs claim that the fees they have been charged violate the E-Government Act because they exceed the cost of providing the records. (Compl. at 2.) Furthermore, they claim that excessive fees have "inhibited public understanding of the courts and thwarted equal access to justice." (*Id.* at 2.) Based on the alleged violation of the E-Government Act, plaintiffs assert that the Little Tucker Act entitles them to a "refund of the excessive PACER fees illegally exacted." (*Id.* at ¶¶ 33-34.) Plaintiffs seek to pursue this claim on behalf of a class of "all individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (*Id.* at ¶ 27.) "Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000." (*Id.* at ¶ 5.)

ANALYSIS

Defendant seeks dismissal of plaintiffs' complaint on two grounds. First, defendant argues that this suit is barred because a similar suit was filed first in the Court of Federal Claims. Second, it argues that plaintiffs have failed to state a claim under the Little Tucker Act because they did not first present their challenge to the PACER Service Center. The Court rejects both arguments.

I. LEGAL STANDARDS

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on a 12(b)(6) motion, a court may consider the complaint, documents incorporated in the complaint, and matters of which courts may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). To survive a motion to dismiss under Rule 12(b)(1), plaintiffs bear the burden of demonstrating that the Court has subject-matter jurisdiction, and the Court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993).

II. FIRST-TO-FILE RULE

Under the "first-to-file rule," "when two cases are the same or very similar, efficiency concerns dictate that only one court decide both cases." *In re Telebrands Corp.*, 824 F.3d 982, 984 (Fed. Cir. 2016); *see also UtahAmerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012) ("[W]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first." (quoting *Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980))).[2] The rule reflects concerns that "district courts

[2] The Federal Circuit has exclusive jurisdiction over appeals from Little Tucker Act suits, and therefore, the law of the Federal Circuit applies to both the merits of those cases and related procedural issues. 28 U.S.C. § 1295(a)(2); *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 952-53 (Fed. Cir. 1990); *United States v. One (1) 1979 Cadillac Coupe De Ville VIN 6D4799266999*, 833 F.2d 994, 997 (Fed. Cir. 1987). Here, the Court would reach the same result on the first-to-file issue under either the Federal Circuit's or the D.C. Circuit's law.

would be required to duplicate their efforts" and "twin claims could generate contradictory results." *UtahAmerican*, 685 F.3d at 1124. A judge considering a first-to-file challenge to a suit that was filed second and that raises different claims from the first suit should determine "whether the facts and issues 'substantially overlap.'" *Telebrands*, 824 F.3d at 984-85.

Defendant contends that this suit is barred by *Fisher v. United States*, No. 15-1575C, 2016 WL 5362927 (Fed. Cl. Sept. 26, 2016). According to defendant, both this case and *Fisher* "involve allegations that the same entities utilized the PACER System and were charged more for downloading information than is authorized by the same statutes and agreements." (Def.'s Mot. at 13.) Furthermore, defendant asserts that "[t]he class here would include nearly every class member in *Fisher*." (*Id.*) Plaintiffs respond that "plaintiff in *Fisher* challenges a particular aspect of the formula that PACER uses to convert docket reports to billable pages" but he "does *not* . . . challenge the PACER fee schedule itself, as our case does." (Pls.' Opp. at 2.)

The Court agrees that the first-to-file rule does not apply here. According to the class action complaint in *Fisher*, "PACER claims to charge users $0.10 for each page in a docket report" and calculates pages by equating 4,320 extracted bytes to one page, thus "purporting to charge users $0.10 per 4,320 bytes. But the PACER system actually miscalculates the number of extracted bytes in a docket report, resulting in an overcharge to users." First Am. Class Action Compl. at ¶¶ 2, 37, *Fisher v. United States*, No. 15-1575C (Fed. Cl. May 12, 2016), ECF No. 8. In their illegal exaction claim, the *Fisher* plaintiffs assert that "[t]he Electronic Public Access Fee Schedule only authorizes fees of $0.10 per page," but "[b]y miscalculating the number of bytes in a page, the AO collected charges from Plaintiff and the Class in excess of $0.10 per page . . . ." *Id.* at ¶¶ 73-74. In other words, *Fisher* claims an *error in the application* of the PACER fee schedule to a particular type of request. In contrast, plaintiffs here challenge the

legality of the fee schedule. (Compl. at 2.) These are separate issues, and a finding of liability in one case would have no impact on liability in the other case. Therefore, the Court will not dismiss the suit based on the first-to-file rule.

III. FAILURE TO STATE A LITTLE TUCKER ACT CLAIM

The Little Tucker Act gives district courts jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). Interpreting the identical wording of the Tucker Act, which applies to claims that exceed $10,000, the Federal Circuit has held that a plaintiff can "recover an illegal exaction by government officials when the exaction is based on an asserted statutory power" and "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). The statute causing the exaction must also provide "either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed.Cir.2000)); *see also N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

According to defendant, plaintiffs have failed to state a claim under the Little Tucker Act and that failure warrants dismissal under Federal Rules of Civil Procedure 12(b)(6) and also 12(b)(1), because the Little Tucker Act is the source of the Court's jurisdiction. (Def.'s Mot. at 1, 16 n.6.) Defendant asks this Court to take judicial notice of the fact that users cannot obtain a

PACER account without agreeing to the PACER policies and procedures, which include a statement that users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." (*Id.* at 10, 13.) On the basis of this policy, defendant argues that (1) plaintiffs have not performed a condition precedent in the contract, which is akin to an administrative exhaustion requirement, and (2) plaintiffs have no statutory remedy when they have failed to fulfill the contractual condition. (Def.'s Mot. at 13-19.) Plaintiffs do not dispute the PACER policy statement or object to this Court's taking judicial notice of it, but they argue that the statement is irrelevant because they are not claiming a billing error. (Pls.' Opp. at 4-5.)

The court in *Fisher* has already rejected defendant's arguments that the PACER notification requirement is a contractual condition or creates an administrative exhaustion requirement. *Fisher*, 2016 WL 5362927, at *3, *5-*6 (reasoning that contractual conditions must be expressly stated in conditional language and that there can be no administrative exhaustion requirement unless the suggested administrative proceeding involves some adversarial process). This Court need not reach those legal issues because, unlike *Fisher*, plaintiffs here do not claim a billing error. Therefore, even if the notification requirement constituted a contractual condition, it would not apply to the plaintiffs' challenges to the legality of the fee schedule. Likewise, even if users were required to exhaust their claims for billing errors, that requirement would not apply to the claim in this case. In sum, the PACER policy statement provides no basis for dismissing this suit.

CONCLUSION

For the reasons discussed above, defendant's motion to dismiss or, in the alternative, for summary judgment is denied. A separate Order accompanies this Memorandum Opinion.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 5, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ANSWER

For its answer to the class action complaint in t5he above action, Defendant admits, denies, and alleges as follows:

Introduction[1]

The allegations contained in Plaintiffs' opening paragraphs constitute conclusions of law, and Plaintiffs' characterization of its case, to which no answer is required.

1. Defendant denies the allegations contained in first, second and third sentences of paragraph 1 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 1.

[1] Where Defendant has included the headings from Plaintiffs' Complaint, it has done so merely for ease of reference. Defendant does not thereby admit that the headings are accurate.

2. Defendant denies the allegations contained in the first, second and third sentences of paragraph 2 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 2.

3. Defendant denies the allegations contained in first, second, third and fourth sentences of paragraph 3 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 3.

4. Defendant admits that the AO and the PACER Service Center administer PACER, but denies the allegation that the AO charges fees for access to public records.

Jurisdiction And Venue

5. The allegations contained in paragraph 5 constitute conclusions of law to which no answer is required.

6. The allegations contained in paragraph 6 constitute conclusions of law to which no answer is required.

Allegations

7. Denies the allegation contained in the first sentence of paragraph 7. Admits that PACER is managed by the AO, but denies the other allegations contained in the second sentence of

paragraph 7. Denies the allegation contained in the third and fourth sentence of paragraph 7. Admits that the current court fee is $0.10 per page with a maximum of $3.00 per document or case specific report, (excluding transcripts). Admits the charge for audio files is $2.40 per audio file and that there is no charge for opinions. Denies the allegations contained in the seventh sentence of paragraph 7. The allegations contained in the last sentence of paragraph 7 constitute conclusions of law to which no answer is required.

8. Defendant denies the allegations contained in the first sentence of paragraph 8. The allegations contained in the second sentence of paragraph 8 constitute conclusions of law to which no answer is required; to the extent that they may be deemed allegations of fact, they are denied. Defendant denies the allegations contained in the third sentence of paragraph 8.

9. Denied.

10. Defendant denies the allegations contained in the first sentence of paragraph 10, and denies the allegations in the second sentence of paragraph 10 that the discussion paper was an internal report on how the ECF system would be funded. Defendant denies the allegations contained in the third sentence of paragraph 10 with regard to any principles being emphasized.

Defendant denies the allegations contained in the fourth sentence of paragraph 10 that the AO contemplated how ECF could be funded.

11. Defendant denies the allegations contained in the first sentence of paragraph 11. The allegations contained in the second sentence of paragraph 11 constitute conclusions of law to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied.

12. Defendant admits the allegations of paragraph 12 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

13. Defendant Admits the allegations contained in the first sentence of paragraph 13 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents. Defendant denies the allegations contained in the remaining sentences of paragraph 13.

14. The allegations contained in the first sentence of paragraph 14 constitute Plaintiffs' characterization of the case, to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied. Defendant admits the allegations contained in the second sentence of paragraph 14 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

15. Defendant admits the allegations contained in paragraph 15 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

16. Defendant admits the allegations contained in paragraph 16 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

17. Defendant admits the allegations contained in paragraph 17 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations

are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

18. Defendant admits the allegations contained in paragraph 18 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

19. Defendant denies the allegation contained in the first sentence of paragraph 19. Admits the allegations contained in the second sentence of paragraph 18 to the extent supported by the source cited, which is the best evidence of its contents; otherwise denies the allegations; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents. Defendant denies the allegations contained in the remaining sentences of paragraph 19.

20. Defendant admits the allegations contained in paragraph 20 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

21. Defendant denies the allegations contained in the first sentence of paragraph 21, and admits the allegations contained in the second and third sentence of paragraph 21 to the extent supported by the sources cited, which are the best evidence of their contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

22. Admits the allegations contained in paragraph 22 to the extent supported by the source cited, which is the best evidence of its contents; otherwise denies the allegations.

23. Denied.

24. The allegations contained in the last sentence of paragraph 24 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact they are denied. Defendant admits the allegations contained in the rest of paragraph 24 to the extent supported by the sources cited, which are the best evidence of their contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

25. The allegations in the first sentence of paragraph 25 relate to a 10-year-old complaint that is not available on PACER

and are denied for lack of knowledge or information sufficient to form a belief as to their truth. The allegation contained in the last sentence of paragraph 25 constitutes a conclusion of law to which no response is required. Defendant admits the allegations contained in the other sentences in paragraph 25 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

26. The allegation contained in paragraph 26 constitutes a conclusion of law to which no response is required.

27. The allegation contained in paragraph 27 constitutes a restatement of Plaintiffs' case to which no response is required; to the extent that it may be deemed an allegation of fact, it is denied.

28. The allegations contained in paragraph 28 constitute conclusions of law to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied.

29. The allegations contained in paragraph 29, including parts i and ii, constitute conclusions of law to which no answer is required; to the extent that they may be deemed allegations of fact, they are denied.

30-34. The allegations contained in paragraphs 30 to 34 constitute conclusions of law to which no answer is required; to the extent that they may be deemed an allegation of fact, they are denied.

The remainder of the Complaint is Plaintiffs' prayer for relief. Defendant denies that Plaintiffs are entitled to the relief set forth in the prayer for relief or to any relief whatsoever.

Defendant denies each and every allegation not previously admitted or otherwise qualified.

Affirmative Defense(s)

Plaintiffs have failed timely to exhaust administrative remedies that were available to them and which they agreed to employ to contest their billings, and, as a result, they have also failed to mitigate damages.

WHEREFORE, defendant requests that the Court enter judgment in its favor, order that the complaint be dismissed, and grant defendant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

CHANNING D. PHILLIPS, DC Bar #415793
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536
mark.nebeker@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF DANIEL L. GOLDBERG

I, Daniel L. Goldberg, declare as follows:

1. I am the Legal Director of the Alliance for Justice (AFJ), a national association of over 100 public-interest organizations that focus on a broad array of issues—including civil rights, human rights, women's rights, children's rights, consumer rights, and ensuring legal representation for all Americans. On behalf of these groups and the public-interest community, AFJ works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans.

2. AFJ has paid at least $391.40 in fees to the PACER Service Center to obtain public court records within the past six years. AFJ has never sought exemptions from PACER fees at any time during the class period given the financial-hardship and other requirements that would have applied. In 2015, AFJ's annual revenues were $4.02 million, our expenses were $4.50 million, and our net assets were $4.36 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on January 19, 2017.

/s/ Daniel L. Goldberg
Daniel L. Goldberg

(190 of 1275)

Case: 24-1757 Document: 32-1 Page: 190 Filed: 12/06/2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF STUART ROSSMAN

I, Stuart T. Rossman, declare as follows:

1. I am the Litigation Director of the National Consumer Law Center (NCLC), a national nonprofit organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. NCLC pursues these goals through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation.

2. In the course of its research, litigation, and other activities, NCLC has paid at least $5,863.92 in fees to the PACER Service Center to obtain public court records within the past six years. NCLC has never sought exemptions from PACER fees at any time during the class period given the financial-hardship and other requirements that would have applied. In 2015, NCLC's annual revenues were $11.49 million, our expenses were $11.72 million, and our net assets were $17.97 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on January 19, 2017.

Stuart T. Rossman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF BARTON F. STICHMAN

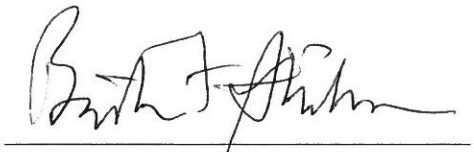
I, Barton F. Stichman, declare as follows:

1. I am Joint Executive Director of the National Veterans Legal Services Program (NVLSP), a nonprofit organization that seeks to ensure that American veterans and active-duty personnel receive the full benefits to which they are entitled for disabilities resulting from their military service. Over the years, the organization has represented thousands of veterans in court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs.

2. In 2016, NVLSP paid $317 in fees to the PACER Service Center to obtain public court records. I estimate that we paid similar amounts annually over the past six years. NVLSP has never sought exemptions from PACER fees during the class period given the financial-hardship requirements that would have applied. In 2014, NVLSP had revenues of $3.75 million, expenses of $3.72 million, and net assets of $3.86 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on January 19, 2017.



Barton F. Stichman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiffs' motion for class certification [ECF No. 8] is **GRANTED**; and it is further

ORDERED that pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), a class is certified that consists of:

> All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.

It is further **ORDERED** that the Court certifies one class claim: that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under the Little Tucker Act; it is further

ORDERED that Gupta Wessler PLLC and Motley Rice LLC are appointed as co-lead class counsel; and it is further

ORDERED that within 30 days of the date of this Order, the parties shall file an agreed-

upon proposed form of class notice. If the parties cannot agree on a proposed form of class notice, then they shall file separate proposed forms within 20 days of the date of this Order. After a form of class notice has been determined by the Court, class counsel shall ensure that individual notice is provided to all absent class members who can be identified through reasonable efforts using the records maintained by defendant, as required by Fed. R. Civ. P. 23(c)(2), within 90 days of the Court's order approving the form of notice. Class counsel shall pay all costs incurred to provide notice.

It is further **ORDERED** that the parties shall proceed according to the Scheduling Order issued on January 24, 2017.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: January 24, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

MEMORANDUM OPINION

Plaintiffs, organizations and individuals who have paid fees to obtain records through the Public Access to Court Electronic Records system (PACER), claim that PACER's fee schedule is higher than necessary to cover the costs of operating PACER and therefore violates the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (codified as 28 U.S.C § 1913 note). (Compl. at 2, ECF No. 1.) They have brought this class action against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), to recover the allegedly excessive fees that they have paid over the last six years. (*Id.* at 14-15, ¶¶ 33-34.) Plaintiffs have moved to certify a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. Class Certif., ECF No. 8.) The proposed class representatives are three nonprofit legal advocacy organizations: the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice. (*Id.* at 14.) Defendant opposes class certification primarily on the ground that the named plaintiffs are not adequate representatives because they are eligible to apply for PACER fee exemptions, while some other

class members are not. (Def.'s Opp., ECF. No. 13) For the reasons herein, the Court will grant plaintiffs' motion and certify a class under Rule 23(b)(3).

BACKGROUND

PACER is an online electronic records system provided by the Federal Judiciary that allows public access to case and docket information from federal courts. PACER, https://www.pacer.gov (last visited Jan. 23, 2017). Congress has authorized the Judicial Conference that it "may, only to the extent necessary, prescribe reasonable fees . . . for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. The fees "shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.* Plaintiffs allege that the fee to use PACER was $.07 per page in 1998, with a maximum of $2.10 per request introduced in 2002. (Compl. at ¶ 8.) The fee increased to $.08 per page in 2005 and to $.10 per page in 2012. (*Id.* at ¶¶ 13, 19.)

The current PACER fee schedule issued by the Judicial Conference sets forth both the access fees and the conditions for exemption from the fees. *Electronic Public Access Fee Schedule*, PACER, https://www.pacer.gov/documents/epa_feesched.pdf (Effective Dec. 1, 2013). The current fee is $.10 per page, with a maximum of $3.00 per record for case documents but no maximum for transcripts and non-case specific reports. *Id.* There is no fee for access to judicial opinions, for viewing documents at courthouse public access terminals, for any quarterly billing cycle in which a user accrues no more than $15.00 in charges, or for parties and attorneys in a case to receive one free electronic copy of documents filed in that case. *Id.* As a matter of discretion, courts may grant fee exemptions to "indigents, bankruptcy case trustees, *pro bono* attorneys, *pro bono* alternative dispute resolution neutrals, Section 501(c)(3) not-for-profit organizations, and individual researchers associated with educational institutions," but only if

they "have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information." *Id.* "Courts should not . . . exempt individuals or groups that have the ability to pay the statutorily established access fee." *Id.* "[E]xemptions should be granted as the exception, not the rule," should be granted for a definite period of time, and should be limited in scope. *Id.*

Plaintiffs claim that the fees they have been charged violate the E-Government Act because they are "far more than necessary to recover the cost of providing access to electronic records." (Compl. at 2, ¶ 9.) For example, in 2012 the judiciary spent $12.1 million generated from public access receipts on the public access system, while it spent more than $28.9 million of the receipts on courtroom technology. (*Id.* at ¶ 20.) "In 2014 . . . the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems." (*Id.* at ¶ 21.) Furthermore, plaintiffs claim that excessive fees have "inhibited public understanding of the courts and thwarted equal access to justice." (*Id.* at 2.) Based on the alleged violation of the E-Government Act, plaintiffs assert that the Little Tucker Act entitles them to a "refund of the excessive PACER fees illegally exacted." (*Id.* at ¶¶ 33-34.) "Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000." (*Id.* at ¶ 5.)

Named plaintiffs are nonprofit organizations that have incurred fees for downloading records from PACER. (Compl. at ¶¶ 1-3.) Plaintiff National Veterans Legal Services Program (NVLSP) "has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs." (*Id.* at ¶ 1; Stichman

Decl. ¶ 1, ECF No. 30.) Plaintiff National Consumer Law Center (NCLC) conducts "policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates." (Compl. at ¶ 2; Rossman Decl. ¶ 1, ECF No. 29.) Plaintiff Alliance for Justice (AFJ) "is a national association of over 100 public-interest organizations that focus on a broad array of issues" and "works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans." (Compl. at ¶ 3; Goldberg Decl. ¶ 1, ECF No. 28.)

During the six years covered by this lawsuit, named plaintiffs regularly paid fees to use PACER. NVLSP paid $317 in PACER fees in 2016 and estimates that it has paid similar amounts annually over the past six years. (Stichman Decl. ¶ 2.) NCLC paid at least $5,863 in fees during the past six years. (Rossman Decl. ¶ 2; Mot. Hr'g Tr. 2, Jan. 18, 2017.) AFJ paid at least $391 in fees during the past six years. (Goldberg Decl. ¶ 2; Tr. 3.) None of the three named plaintiffs asked for exemptions from PACER fees, because they could not represent to a court that they were unable to pay the fees. (Tr. 3-4.) The reason for this is that each organization has annual revenue of at least $3 million. (*Id.*; Stichman Decl. ¶ 2; Rossman Decl. ¶ 2; Goldberg Decl. ¶ 2.)

In a prior opinion, this Court denied defendant's motion to dismiss the suit. *See National Veterans Legal Services Program v. United States*, No. 16-cv-745, 2016 WL 7076986 (D.D.C. Dec. 5, 2016). First, the Court held that the first-to-file rule did not bar this suit because it concerns the legality of the PACER fee schedule, whereas the plaintiffs in *Fisher v. United States*, No. 15-1575C (Fed. Cl. May 12, 2016), claim an error in the application of the fee schedule. *Id.* at *3. Second, the Court held that plaintiffs were not required to alert the PACER Service Center about their claims as a prerequisite to bringing suit under the Little Tucker

Act. *Id.*

In the current motion, plaintiffs have asked this Court to certify a class under Rule 23(b)(3) or, in the alternative, 23(b)(1). (Pls.' Mot. at 18.) Their motion proposed a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (*Id.* at 1.) In opposition to class certification, defendant argues that (1) plaintiffs have failed to demonstrate that they satisfy the numerosity requirement, because they have not established the number of users who raised their concerns with the PACER Service Center or the number of potential plaintiffs who are nonprofit organizations; (2) the class representatives fail the typicality and adequacy requirements, because their nonprofit status makes them eligible to request fee exemptions, which not all class members can do; (3) the Court should not allow this suit to proceed as a class action, because it could produce results that conflict with those in *Fisher*; and (4) individual questions predominate, because the Court would need to determine whether each user received free pages in excess of the 30 charged pages, such that the user's per page cost did not violate the E-Government Act. (Def.'s Opp. at 9-22.)

ANALYSIS

I. JURISDICTION

Although defendant has not raised any jurisdictional arguments in its opposition to class certification, courts must assure themselves that they have jurisdiction. Plaintiffs have brought this case under the Little Tucker Act, which gives district courts jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any

express or implied contract with the United States." 28 U.S.C. § 1346(a)(2).[1] Interpreting the identical wording of the Tucker Act, which applies to claims that exceed $10,000, the Federal Circuit has held that a plaintiff can "recover an illegal exaction by government officials when the exaction is based on an asserted statutory power" and "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005).[2]

In their complaint, plaintiffs request "monetary relief for any PACER fees collected by the defendant in the past six years that are found to exceed the amount authorized by law." (Compl. at 14-15.) A suit in district court under the Little Tucker Act may seek over $10,000 in total monetary relief, as long as the right to compensation arises from separate transactions for which the claims do not individually exceed $10,000. *Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 76-77 (D.D.C. 1991); *Alaska Airlines v. Austin*, 801 F. Supp. 760, 762 (D.D.C. 1992), *aff'd*

[1] The Federal Circuit has exclusive jurisdiction over appeals from Little Tucker Act suits, and therefore, the law of the Federal Circuit applies to both the merits of those cases and related procedural issues. 28 U.S.C. § 1295(a)(2); *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 952-53 (Fed. Cir. 1990); *United States v. One (1) 1979 Cadillac Coupe De Ville VIN 6D4799266999*, 833 F.2d 994, 997 (Fed. Cir. 1987). This Court refers to Federal Circuit precedent when it exists.

[2] For the Court to have jurisdiction over an illegal exaction claim under the Little Tucker Act, the statute causing the exaction must also provide "either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed.Cir.2000)). The Court of Federal Claims has taken an expansive view of the phrase "necessary implication" because "[o]therwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse for recouping the money overpaid." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

in relevant part by Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 797 (Fed. Cir. 1993); *United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698, 701 (6th Cir. 1955). Plaintiffs assert that no class member has a claim exceeding $10,000 for a single PACER transaction, and defendant does not dispute this. (Pls.' Mot. at 11; Tr. 22-23.) Therefore, plaintiffs' monetary claim does not exceed the jurisdictional limitation of the Little Tucker Act.

II. CLASS CERTIFICATION

Rule 23 sets forth two sets of requirements for a suit to be maintained as a class action. Fed. R. Civ. P. 23. First, under Rule 23(a), all class actions must satisfy the four requirements of numerosity, commonality, typicality, and adequacy. Second, the suit must fit into one of the three types of class action outlined in Rule 23(b)(1), (b)(2), and (b)(3). The Court finds that this suit satisfies the 23(a) requirements and that a class should be certified under 23(b)(3).

A. Class Definition

In their motion for class certification, plaintiffs propose a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. at 1.) At the motion hearing, plaintiffs suggested that it would actually only be necessary to exclude federal executive branch agencies, because their concern was that the Justice Department could not both defend the suit and represent executive branch agency plaintiffs. (Tr. 5-7.) The Court shares plaintiffs' concern but finds that the issue is not limited to executive branch agencies. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. Many independent agencies lack independent litigating authority and are instead represented by the Justice Department, at least on some issues or in

some courts. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 263-80 (1994); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 799-804 (2013). Some commentators consider independent regulatory commissions and boards to be on the boundary between the executive and legislative branches, and yet the Solicitor General typically controls their litigation before the Supreme Court. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 867, 920-21 (2014). To avoid individualized questions about the litigating authority of federal entities, the Court will exclude from the class all federal government entities, not only executive branch agencies.

For the sake of clarity, the Court will make two additional minor modifications to the proposed class definition before analyzing the requirements of Rule 23. First, the class definition that plaintiffs introduced in their complaint and repeated in their motion for class certification defines the class in terms of those "who have paid fees for the use of PACER within the past six years," but that language is unclear when it is no longer associated with the dated complaint. Thus, the Court will substitute the actual dates for the six-year period ending on the date of the complaint—April 21, 2016. (Compl. at 15.) Second, rather than stating that the definition excludes "class counsel," the Court will state that it excludes "class counsel in this case." Plaintiffs' counsel stated at the motion hearing that they were excluding only themselves, not all PACER users who have acted as counsel in class actions. (*See* Tr. 7.). The modified class definition is: "All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities."

B. Rule 23(a) Requirements

Under Rule 23(a), a suit may be maintained as a class action "only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

1. Numerosity

Plaintiffs claim that the joinder of all members of their proposed class would be impracticable because they estimate that the class contains at least several hundred thousand members. (Pls.' Mot. at 12-13.) Defendant raises two arguments to challenge this contention. First, defendant argues that "[p]laintiffs have failed to establish that there exist sufficient numbers of would-be class members who may pursue viable claims for alleged overpayment of PACER fees, because all PACER users agree that they will raise any concerns with their PACER bills with the PACER Service Center within 90 days of receiving their bills." (Def.'s Opp. at 9.) In denying defendant's motion to dismiss, this Court has already held that plaintiffs were not required to alert the PACER Service Center about their claims as a prerequisite to bringing suit under the Little Tucker Act. *NVLSP*, 2016 WL 7076986, at *3. Therefore, defendant is wrong to count only potential class members who have alerted the PACER Service Center.

Second, defendant argues that "[p]laintiffs are only able adequately to represent the

interests of non-profit PACER users" and "named Plaintiffs have made no attempt to identify the number of non-profit organizations who would share their claims." (Def.'s Opp. at 10.) As defendant's own language suggests, defendant's argument is actually about adequacy of representation, not about numerosity. When the Court reaches the adequacy requirement below, it will address plaintiffs' ability to represent entities other than nonprofit organizations.

Defendant does not dispute that it would be impracticable to join all members of the class that plaintiffs have proposed: "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. at 1; Def.'s Opp. at 9-10.) In 2012 the Judiciary reported that there were currently more than 1.4 million user accounts, and there had been 325,000 active users in 2009. *Electronic Public Access Program Summary*, PACER (Dec. 2012), https://www.pacer.gov/documents/epasum2012.pdf. Accepting the Judiciary's estimate that approximately 65-75 percent of active users are exempt from fees in at least one quarter during a typical fiscal year, *id.*, there remain a very large number of users paying fees in a typical year. Although the parties have not presented any precise data about the size of the class, there is no question that the class satisfies the numerosity requirement.

2. Commonality

A common question is a question "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Plaintiffs argue that the two most important questions presented by their suit are common: (1) "Are the fees imposed for PACER access excessive in relation to the cost of providing the access . . . ?" and (2) "[W]hat is the measure of damages for the excessive fees charged?" (Pls.'

Mot. at 13.) Defendant has not argued that plaintiffs' proposed class fails to satisfy the commonality requirement (*see* Def.'s Opp. at 8),[3] and this Court agrees that the legality of the PACER fee schedule and the formula for measuring any damages are common questions.

3. Typicality

A class representative's "'claim is typical if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member's where his or her claims are based on the same legal theory.'" *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003) (quoting *Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C.1996)). A leading treatise on class actions has explained that "typicality focuses on the similarities between the class representative's claims and those of the class while adequacy focuses on evaluating the incentives that might influence the class representative in litigating the action, such as conflicts of interest." William B. Rubenstein, *Newberg on Class Actions* § 3:32 (5th ed. 2016).

According to named plaintiffs, their claims "are typical of the class because they arise from the same course of conduct by the United States (imposing a uniform PACER fee schedule that is higher than necessary to reimburse the cost of providing the service) and are based on the same legal theory (challenging the fees as excessive, in violation of the E-Government Act)." (Pls.' Mot. at 14.). In response, defendant argues that named plaintiffs are "unlike other PACER users, in that they have the ability to request PACER fee exemptions as non-profits." (Def.'s Opp. at 11.) According to defendant, named plaintiffs' claims are not typical because they "appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (*Id.* at 13.)

[3] Defendant stated on the first page of its filing that "Plaintiffs have failed to establish . . . a commonality of claims." (Def.'s Opp. at 1.) However, it omitted commonality from a later list of challenges, *see id.* at 8, and failed to raise any argument about commonality.

Contrary to defendant's argument, plaintiffs satisfy the typicality requirement. Named plaintiffs and all class members are challenging the PACER fee schedule on the theory that it violates the E-Government Act by generating revenue that exceeds the costs of providing PACER. Defendant's objection focuses not on differences between named plaintiffs' claims and those of other class members but on incentives that could affect how named plaintiffs would pursue the litigation. Thus, the Court will address defendant's objection under the rubric of adequacy, which is the crux of defendant's opposition.

4. Adequacy

"'Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.'" *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575-76 (D.C. Cir. 1997) (quoting *Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)). Conflicts of interest prevent named plaintiffs from satisfying the adequacy requirement only if they are "fundamental to the suit and . . . go to the heart of the litigation." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205, 216 (D.D.C. 2015) (quoting *Newberg* § 3:58); *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012). Furthermore, conflicts will not defeat the adequacy requirement if they are speculative or hypothetical. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003). "[P]otential conflicts over the distribution of damages . . . will not bar a finding of adequacy at the class certification stage." *Newberg* § 3:58.

According to defendant, named plaintiffs are not adequate representatives because "[t]heir interests in free PACER access for their favored subset of PACER users diverge from the

interests of those PACER [users] seeking to minimize their costs of PACER use." (Def.'s Opp. at 15.) Defendant argues that named plaintiffs' nonprofit status gives them "the ability to request PACER fee exemptions." (*Id.* at 11.) Defendant further asserts that named plaintiffs are "interest[ed] in free PACER access to their groups of veterans, elderly and low-income consumers, and other public interest organizations of concern to the named Plaintiffs." (*Id.* at 12.) As a result, defendant reasons, "Plaintiffs appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (*Id.* at 13.)

Defendant greatly exaggerates the relevance of named plaintiffs' nonprofit status. It is true that "a court may consider exempting . . . Section 501(c)(3) not-for-profit organizations" from payment of PACER fees. *Electronic Public Access Fee Schedule*. However, the Fee Schedule also instructs courts that applicants must "have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information." *Id.* "Courts should not . . . exempt individuals or groups that have the ability to pay the statutorily established access fee." *Id.* "[E]xemptions should be granted *as the exception*, not the rule." *Id.* (emphasis added). Courts grant exemptions only for access to their own district's records, and some districts are more willing than others to grant exemptions. *See* Christina L. Boyd & Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 Just. Sys. J. 249, 255 & n.1 (2013). This Court has found examples where courts granted exemptions to nonprofit organizations for purposes of litigation, but those organizations had claimed that payment of PACER fees was a financial hardship. *See, e.g.*, Orders Granting Request for Exemption, *PACER Service Center Exemption Requests & Orders*, No. 3:02-mc-00006 (D. Or. 2015), ECF Nos. 33, 35.

Named plaintiffs are not exempt from PACER fees and thus share with the other class members an interest in reducing the fees. The PACER fees that named plaintiffs have paid are low relative to their annual revenue and other costs of litigation. Because of their multimillion dollar annual budgets, named plaintiffs have averred that they cannot represent that they are unable to pay PACER fees, and as a result, they cannot qualify for exemptions. (Tr. 3-4.) Thus, named plaintiffs must pay PACER fees and accordingly have an interest in reducing those fees.

In fact, the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives. They are interested in reducing PACER fees not only for themselves but also for their constituents. As nonprofit organizations, named plaintiffs exist to advocate for consumers, veterans, and other public-interest causes. (Compl. at ¶¶ 1-3.) The Alliance for Justice is an association of over 100 public-interest organizations, many of whom may face the same barriers as named plaintiffs to obtaining fee exemptions. Individual consumers and veterans may be eligible to apply for exemptions if they are indigent. *Electronic Public Access Fee Schedule*. However, courts frequently deny exemptions even to plaintiffs who have *in forma pauperis* status. *See, e.g.*, *Oliva v. Brookwood Coram I, LLC*, No. 14–cv–2513, 2015 WL 1966357, at *2 (E.D.N.Y. April 30, 2015); *Emrit v. Cent. Payment Corp.*, No. 14–cv–00042, 2014 WL 1028388, at *3 (N.D. Cal. Mar. 13, 2014); *Scott v. South Carolina*, Civ. No. 6:08-1684, 2009 WL 750419, at *1-*2 (D.S.C. March 18, 2009). Thus, named plaintiffs have dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent. In addition, "organizational representatives with experience" can "provide more vigilant and consistent representation than individual representatives." *In re Pharm. Indus. Average Wholesale Price Litig.*, 277 F.R.D. 52, 62 (D. Mass. 2011).

In an attempt to argue that named plaintiffs' commitment to increasing public PACER

access actually disqualifies them from being representatives in this suit, defendant asserts that "[p]laintiffs appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (Def.'s Opp. at 13.) This argument assumes the existence of some class members who would argue that the E-Government Act requires the Judicial Conference to eliminate exemptions and charge paying users only the fees that are necessary to provide PACER to them. Not only is such a claim based on sheer speculation, it also lacks viability given that Congress has explicitly directed the Judicial Conference that the "fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." 28 U.S.C. § 1913 note. Even if a claim to eliminate exemptions were viable and not speculative, it would not create a conflict of interest that would prevent named plaintiffs from being adequate representatives, for a claim to eliminate exemptions would be independent from the claim in this case (i.e., that the E-Government Act prevents the Judiciary from collecting PACER fees that are not necessary to fund PACER). Named plaintiffs' pursuit of this class action will not interfere with other plaintiffs' ability to pursue a claim for elimination of exemptions. For all of these reasons, whether named plaintiffs lack interest in challenging the current exemption policy is irrelevant to their ability to serve as representatives in this suit.

Regarding the adequacy of class counsel, defendant argues only that the divergence in interests between named plaintiffs and other class members prevents named plaintiffs' counsel from adequately representing all class members. (Def.'s Opp. at 15.) The Court rejects this argument for the same reasons that it has already rejected defendant's argument that named plaintiffs have a conflict of interest with other class members. There is no dispute about the

competency of class counsel. (*See* Pls.' Mot., Attachments 1-3; Def.'s Opp. at 15.) In sum, named plaintiffs and their counsel satisfy the adequacy requirement.

C. Rule 23(b) Requirements

Rule 23(b) describes three types of class action and requires every class action to match one or more of the three types. Fed. R. Civ. P. 23(b); *Newberg* § 4:1. Plaintiffs argue that their proposed class can be certified under 23(b)(1) or 23(b)(3).

1. Rule 23(b)(1)

In a 23(b)(1) class action, "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). According to the Advisory Committee notes to Rule 23, an action "to compel or invalidate an assessment" is the type of class action contemplated in Rule 23(b)(1). Fed. R. Civ. P. 23(b)(1) advisory committee's note to 1966 amendment.

In their motion, plaintiffs argue that Rule 23(b)(1) permits certification of this class action because plaintiffs' complaint "seeks equitable relief," and inconsistent results in separate actions for equitable relief could force the Judiciary into a conflicted position. (Pls.' Mot. at 18.) Plaintiffs' complaint does ask the Court to "[d]eclare that the fees charged for access to records through PACER are excessive." (Compl. at 15.) However, at the motion hearing, plaintiffs stated that the declaration they are requesting is merely a step on the way to granting monetary relief, it is "not . . . equitable relief," and it "wouldn't bind anyone." (Tr. 12-13.) Indeed,

plaintiffs acknowledged that they "couldn't seek equitable relief" under the Little Tucker Act. (*Id.*; *see also Doe v. United States*, 372 F.3d 1308, 1312-14 (Fed. Cir. 2004); *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 859 (Fed. Cir. 1992).) Therefore, the Court will not certify the class under Rule 23(b)(1).

2. Rule 23(b)(3)

To certify a class under Rule 23(b)(3), a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs argue that "[t]he sole individual issue—calculation of each class member's recovery . . . is ministerial" and therefore the common legal questions predominate. (Pls.' Mot. at 19.) In opposition, defendant contends that "the Court will have to assess whether and in what degree the individual Plaintiffs were able to secure free pages in excess of the 30 pages for which they were charged for lengthy documents. If the individual plaintiff's downloads of these documents operate to decrease the per page cost to below that sought by Plaintiffs, then there will be no liability to the class-member." (Def.'s Opp. at 20.) The Court does not share defendant's concern, because plaintiffs' theory of liability is that the fee schedule itself violated the E-Government Act, not that charges to individual plaintiffs violated the Act when they amounted to more than the cost of distribution to those particular plaintiffs. (*See* Pls.' Reply at 6, ECF No. 17.) If plaintiffs prevail on their common legal theory that the Judiciary was required to set a lower rate that corresponded to PACER's funding needs, defendant would be liable to any class member who paid the illegal higher rate. Calculating the amount of damages would be ministerial because it would be proportional to the fees that plaintiffs paid, rather than dependent upon the types of

documents that they obtained. Therefore, the Court finds that common questions predominate.

Although defendant does not use the word "superiority," it also objects that "class action litigation was not intended to facilitate *two* class actions, which would result if this case proceeds as a class and the *Fisher* case is similarly prosecuted." (Def.'s Opp. at 21.) This Court has already rejected the argument that *Fisher* should bar this suit, explaining that the suits make different claims. *NVLSP*, 2016 WL 7076986, at *3. Besides, defendant's argument has nothing to do with the superiority of the class action vehicle, as opposed to individual actions.[4]

Allowing this action to proceed as a class action is superior to requiring individual actions, both for reasons of efficiency and to enable individuals to pursue small claims. As the Supreme Court has explained, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In sum, the Court will certify the class under Rule 23(b)(3), but it in no way resolves the merits of plaintiffs' challenge to the PACER fee schedule.

III. NOTICE TO CLASS MEMBERS

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In their motion for class certification, plaintiffs proposed a class-notice plan involving "email notice . . . to each class member using the contact information maintained by the government" for PACER users. (*See* Pls.' Mot. at 20.) Plaintiffs "request that the Court direct the parties to file an agreed-upon

[4] Furthermore, the plaintiff in *Fisher* has not yet moved for class certification. (Tr. 9.)

proposed form of notice (or, if the parties cannot agree, separate forms of notice) within 30 days of the Court's certification order, and direct that email notice be sent to the class within 90 days of the Court's approval of a form of notice." (*Id.*) With no opposition from defendant, the Court will grant this request.

CONCLUSION

Plaintiffs' motion for class certification is granted, with minor modifications to the proposed class definition. A separate Order accompanies this Memorandum Opinion.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: January 24, 2017

Exhibit 1

UniqueID: *100000001*

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and April 21, 2016, a class action lawsuit may affect your rights.

Nonprofit groups filed this lawsuit against the United States government, claiming that the government has unlawfully charged PACER users more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-ESH, is pending in the U.S. District Court for the District of Columbia. The Court decided this lawsuit should be a class action on behalf of a "Class," or group of people that could include you. There is no money available now and no guarantee that there will be.

Are you included? Records of the Administrative Office of the U.S. Courts indicate that you paid to access records through PACER (the Public Access to Court Electronic Records system) between April 21, 2010 and April 21, 2016. The Class includes everyone that paid PACER fees between April 21, 2010 and April 21, 2016, excluding class counsel in this case and federal government entities.

What is this lawsuit about? The lawsuit claims that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to court records, and that the federal courts are charging more than necessary to recover the costs of PACER. The lawsuit further alleges that the federal courts have used the excess PACER fees to pay for projects unrelated to providing public access to court records. The lawsuit seeks the recovery of the excessive portion of the fees. The government denies these claims and contends that the PACER fees are lawful. The Court has not decided who is right. The lawyers for the Class will have to prove their claims in court.

Who represents you? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as "Class Counsel." You don't have to pay Class Counsel or anyone else to participate. If Class Counsel obtains money or benefits for the Class, they will ask the Court for an award of fees and costs, which will be paid by the United States government or out of any money recovered for the Class. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court.

What are your options? If you are a Class Member, you have a right to stay in the Class or be excluded from the lawsuit.

OPTION 1. Do nothing. Stay in the lawsuit. If you do nothing, you are choosing to stay in the Class. You will be legally bound by all orders and judgments of the Court, and you won't be able to sue the United States government for the claims made in this lawsuit. If money or benefits are obtained, you will be able to obtain a share. There is no guarantee that the lawsuit will be successful.

OPTION 2. Exclude yourself from the lawsuit. Alternatively, you have the right to not be part of this lawsuit by excluding yourself or "opting out" of the Class. If you exclude yourself, you cannot get any money from this lawsuit if any is obtained, but you will keep your right to separately sue the United States government over the legal issues in this case. If you do not wish to stay in the Class, you must request exclusion in one of the following ways:

1. Send an "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from *Nat'l Veterans Legal Services Program v. United States* Case No. 1:16-cv-00745-ESH. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by July __, 2017,** to: PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940-3434.

2. Complete and submit online the Exclusion Request form found here by **July __, 2017.**

3. Send an Exclusion Request Form, available here, by mail. You must mail your Exclusion Request form, **postmarked by July __, 2017,** to: PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940-3434.

If you choose to exclude yourself from the lawsuit, you should decide soon whether to pursue your own case because your claims may be subject to a statute of limitations which sets a deadline for filing the lawsuit within a certain period of time.

How do I find out more about this lawsuit? For a detailed notice and other documents about this lawsuit and your rights, go to www.PACERFeesClassAction.com, call 1-844-660-2215, write to PACER Fees Class Action Administrator, PO Box 43434, Providence, RI 02940-3434 or call Class Counsel at 1-866-274-6615.

1-844-660-2215 OR www.PACERFeesClassAction.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Civil Action No. 16-745 ESH

ORDER APPROVING PLAN OF CLASS NOTICE

WHEREAS, on January 24, 2017, this Court certified the following Class:

> All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.

Therefore, pursuant to Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure, and based upon the record and Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents ("Plaintiffs' Motion," dkt. #42);

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion is GRANTED.

2. The Revised Email Notice of Pendency of Class Action Lawsuit ("Email Notice"); the Revised Postcard Notice of Pendency of Class Action Lawsuit ("Postcard Notice"); the long-form Notice of Pendency of Class Action available online ("Long-Form Notice"); the printable Exclusion Form; and the online Exclusion Form are hereby approved as to form. *See* Exhibits 1 and 2 to Notice of Filing of Revised Notice Documents ("Notice of Filing," dkt. #43); Exhibits 3, 4, and 5 to Plaintiffs' Motion.

3. To the extent they are not already produced, Defendant shall produce to Plaintiffs' counsel under the terms of the Stipulated Protective Order (dkt. #41) the available names, postal addresses, email addresses, phone numbers, and PACER-assigned account numbers of all individuals and entities who have paid PACER fees ("PACER Fee Database") during the class period. For purposes of this paragraph, "individuals and entities" is defined as all PACER users except the following: (1) any user who, during the quarter billed, is on the master Department of Justice list for that billing quarter; (2) any user with an @uscourts.gov email address extension; or (3) any user whose PACER bill is sent to and whose email address extension is shared with a person or entity that receives PACER bills for more than one account, provided that the shared email address extension is one of the following: @oig.hhs.gov, @sol.doi.gov, @state.gov, @bop.gov, @uspis.gov, @cbp.dhs.gov, @usss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov.[1]

4. On or before the later of (a) thirty days after entry of this Order or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, KCC LLC (the "Claims Administrator") shall cause the Email Notice to be disseminated, in substantially the same form attached as Exhibit 1 to the Notice of Filing, by sending it out via email to potential class members. The Email Notice shall direct potential class members to a website maintained by the Claims Administrator. The sender of the email shall appear to recipients as "PACER Fees Class Action Administrator," and the subject line of the email will be "PACER Fees – Notice of Class Action Lawsuit."

[1] For example, accounting@dol.gov at 200 Constitution Avenue, NW, Washington, DC 20210 receives bills for johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov. None of those email address (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

5. On or before the later of (a) thirty days after entry of this Order or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, the Claims Administrator shall make available to potential class members automated telephone support to handle any inquiries from potential class members.

6. On or before the later of (a) thirty days after entry of an Order approving this Plan, or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, Plaintiffs, through KCC, will establish and maintain a website in order to respond to inquiries by potential class members. The website shall include the complete text of the Long-Form Notice attached to Plaintiffs' Motion as Exhibit 3, the printable Exclusion Request form, the online Exclusion Request form, this Order, Plaintiffs' Class Action Complaint (dkt. #1), Defendant's Answer (dkt. #27), the Order on the Motion for Class Certification (dkt. #32), the Memorandum Opinion on the Motion for Class Certification (dkt. #33), and other relevant documents.

7. On or before the later of (a) forty-five days after entry of this Order or (b) forty-five days after Plaintiffs receive the PACER Fee Database from Defendant, the Claims Administrator shall cause the Postcard Notice to be disseminated, in substantially the same form attached as Exhibit 2 to the Notice of Filing, by sending it out via U.S. mail to all potential class members (1) without an email address and (2) for whom email delivery was unsuccessful. The Postcard Notice shall direct potential class members to the website maintained by the Claims Administrator.

8. On the later of (a) ninety days after entry of this Order or (b) ninety days after Plaintiffs receive the PACER Fee Database from Defendant, the opt-out period shall expire.

9. The Court finds that the dissemination of the Notice under the terms and in the format provided for in Plaintiffs' Motion and this Order constitutes the best notice practicable under the circumstances, that it is due and sufficient notice for all purposes to all persons entitled to such notice, and that it fully satisfies the requirements of due process and all other applicable laws.

IT IS SO ORDERED.

Dated: April 17, 2017

/s/ *Ellen Segal Huvelle*
The Honorable Ellen Segal Huvelle
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

William H. Narwold
Meghan S.B. Oliver
Elizabeth Smith
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
(202) 232-5504
bnarwold@motleyrice.com

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice and the Class

August 28, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

INTRODUCTION

This class action challenges the legality of the fees that the federal judiciary charges people to access its Public Access to Court Electronic Records system, known as PACER. The plaintiffs contend that the fees far exceed the cost of providing the records and thus violate the E-Government Act of 2002, which authorizes fees "as a charge for services rendered," but "only to the extent necessary" to "reimburse expenses in providing these services." 28 U.S.C. § 1913 note.

Now that the Court has certified this case as a class action and denied the government's motion to dismiss, two key questions remain: Has the Administrative Office of the U.S. Courts (or AO) violated the E-Government Act by charging more than necessary to recoup the total marginal cost of providing access to records through PACER? And if so, by how much? This motion addresses only the first question. It seeks summary adjudication of the defendant's liability, reserving the damages determination for after formal discovery.

The liability question is straightforward and ripe for resolution. In 2002, Congress found that PACER fees (then set at $.07 per page) were "higher than the marginal cost of disseminating the information." Taylor Decl., Ex. D, at 5. Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.* To this end, the E-Government Act prohibits the imposition of fees that are not "necessary" to "reimburse expenses in providing" access to the records. 28 U.S.C. § 1913 note. The only permissible reading of this language is that it bars the judiciary from charging more in PACER fees, in the aggregate, than the reasonable costs of administering the PACER system.

Despite the E-Government Act's express limitation, PACER fees have twice been *increased* since the Act's passage in 2002. This prompted the Act's sponsor, Senator Joe Lieberman, to reproach the AO for continuing to charge fees "well higher than the cost of dissemination"—"against the requirement of the E-Government Act"—rather than doing what the Act demands:

"create a payment system that is used only to recover the direct cost of distributing documents via PACER." Taylor Decl., Exs. G & H. Instead of complying with the law, the AO has used PACER fees to fund projects far removed from the costs of providing records upon request. For example, it has used the money to buy flat-screen TVs for jurors, to send required notices to bankruptcy creditors, and even to fund a study by the State of Mississippi for its own court system. This is more than enough to establish liability. Although the AO's violations are much more extensive than these isolated examples, this Court need not determine the full extent of the overcharge at this stage. Because PACER fees exceed the marginal costs of providing records, in violation of the E-Government Act, summary adjudication on liability is warranted.

Any other result would not only run afoul of the E-Government Act's text and contravene its purpose but would also raise two serious constitutional problems. The first is reflected in the background law limiting user fees throughout the federal government: Because only *Congress* may constitutionally impose taxes, the general rule is a user fee may not exceed the cost of providing the service "inuring directly to the benefit" of the person who pays that fee—unless Congress has "indicate[d] clearly its intention to delegate" its taxing power. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989). Here, Congress has done the opposite.

The second concern flows from the First Amendment right to access court records. "The Supreme Court has held that a government cannot profit from imposing" a fee "on the exercise of a First Amendment right." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943)). Hence, the general rule is that "fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983). There is no reason for a more fee-friendly rule here, where Congress has imposed the same limitation ("only to the extent necessary") by statute.

BACKGROUND

A. Overview of PACER fees

PACER is a system that provides online access to federal judicial records and is managed by the AO. Pls.' Statement of Undisputed Material Facts (Statement) ¶ 1. The current fee to access records through PACER is set at $.10 per page (with a maximum of $3.00 for "any case document, docket sheet, or case-specific report") and $2.40 per audio file. *Id.* ¶¶ 2–4. Unless a person obtains a fee waiver or incurs less than $15 in PACER charges in a given quarter, he or she will incur an obligation to pay the fees. *Id.* ¶ 5.

B. History of PACER fees

Congress authorizes fees "to reimburse" PACER expenses. This system stretches back to the early 1990s, when Congress began requiring the judiciary to charge "reasonable fees" for access to records. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress sought to limit the fees to the cost of providing the records: "All fees hereafter collected by the Judiciary . . . as a charge for services rendered shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.* The AO set the fees at $.07 per page in 1998. Statement ¶ 10.

It soon became clear that this amount was far more than necessary to recover the cost of providing access to records. But rather than reduce the rate to cover only the costs incurred, the AO instead used the extra revenue to subsidize other information-technology-related projects.

The AO begins using excess PACER fees to fund ECF. The expansion began in 1997, when the judiciary started planning for a new Electronic Case Filing system, known as ECF. *Id.* ¶ 9. The staff of the AO produced a paper discussing how the system would be funded. *Id.* It emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing

a particular service." *Id.* Yet, just two pages later, the AO staff contemplated that ECF could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* The paper did not offer any statutory authority or legal reasoning to support this view.

Congress responds by passing the E-Government Act of 2002. When Congress revisited the subject of PACER fees a few years later, it did not relax the requirement that the fees be limited to the cost of providing access to records. To the contrary, it amended the statute to *strengthen* this requirement.

Recognizing that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information," Congress amended the law "to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." Taylor Decl., Ex. D, at 5 (S. Rep. No. 107–174, 2d Sess., at 23 (2002)); *see* Statement ¶ 11.[1]

The result was a provision of the E-Government Act of 2002 that amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 28 U.S.C. § 1913 note). The full text of the statute is thus as follows:

> **(a)** The Judicial Conference may, *only to the extent necessary*, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections *for access to information available through automatic data processing equipment*. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of

[1] In the language of economics, marginal cost means "the increase in total cost that arises from an extra unit of production." N. Gregory Mankiw, *Principles of Economics* 268 (6th ed. 2012).

> reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> **(b)** The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) *as a charge for services rendered* shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphasis added).

Even after the E-Government Act, the AO increased PACER fees. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Statement ¶ 15. To justify this increase, the AO did not point to any growing costs of providing access to records through PACER. It relied instead on the fact that the judiciary's information-technology fund (or JITF)—the account into which PACER fees and other funds (including "funds appropriated to the judiciary" for "information technology resources") are deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. *See id.*; Taylor Decl., Ex. E (Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges & Clerks (Oct. 21, 2004)); *see also* Taylor Decl., Ex. I, at 3 (Letter from AO Director James Duff explaining: "The JITF finances the IT requirements of the entire Judiciary and is comprised primarily of 'no-year' appropriated funds which are expected to be carried forward each year."). As before, the AO cited no statutory authority for this increase.

The AO finds new ways to spend extra PACER fees as they keep growing. By the end of 2006, the judiciary's information-technology fund had accumulated a surplus of nearly $150 million—at least $32 million of which was from PACER fees. Statement ¶ 16. But once again, the AO did not reduce or eliminate PACER fees. *Id.* ¶ 17. It instead sought out new ways to spend the excess, using it to cover "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance"—services that relate to those

provided by PACER only in the sense that they too concern technology and the courts. *Id.*; Taylor Decl., Ex. G, at 3 (Letter from Sen. Lieberman to Sens. Durbin and Collins (Mar. 25, 2010)).

Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House. She admitted that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Statement ¶ 18. Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements . . . , thereby reducing our need for appropriated funds." *Id.*

The E-Government Act's sponsor says that the AO is violating the law. In early 2009, Senator Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the law. Taylor Decl., Ex. H, at 1 (Letter from Sen. Lieberman to Hon. Lee Rosenthal (Feb. 27, 2009)); *see* Statement ¶ 19. He noted that the Act's "goal" was "to increase free public access to [judicial] records"—allowing fees to be charged only to recover "the marginal cost of disseminating the information"—yet "PACER [is] charging a higher rate" than it did when the law was passed. Taylor Decl., Ex. H, at 1. Importantly, he explained, "the funds generated by these fees are still well higher than the cost of dissemination." *Id.* Invoking the key statutory text, he asked the judiciary to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." *Id.*

The AO's Director replied with a letter defending the AO position that it may use PACER fees to recoup non-PACER-related costs. Taylor Decl., Ex. I. The letter acknowledged that the Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" *Id.* at 1; *see* Statement ¶ 20. Yet the letter claimed that

Congress has "expand[ed] the permissible use of the fee revenue to pay for other services," Taylor Decl., Ex. I, at 2—when in fact it enacted the E-Government Act to do the opposite. The sole support that the AO offered for its view was a sentence in a conference report accompanying the 2004 appropriations bill, which said that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." Taylor Decl., Ex. I, at 2. The letter did not provide any support (even from a committee report) for using fees to recover non-PACER-related expenses beyond ECF.

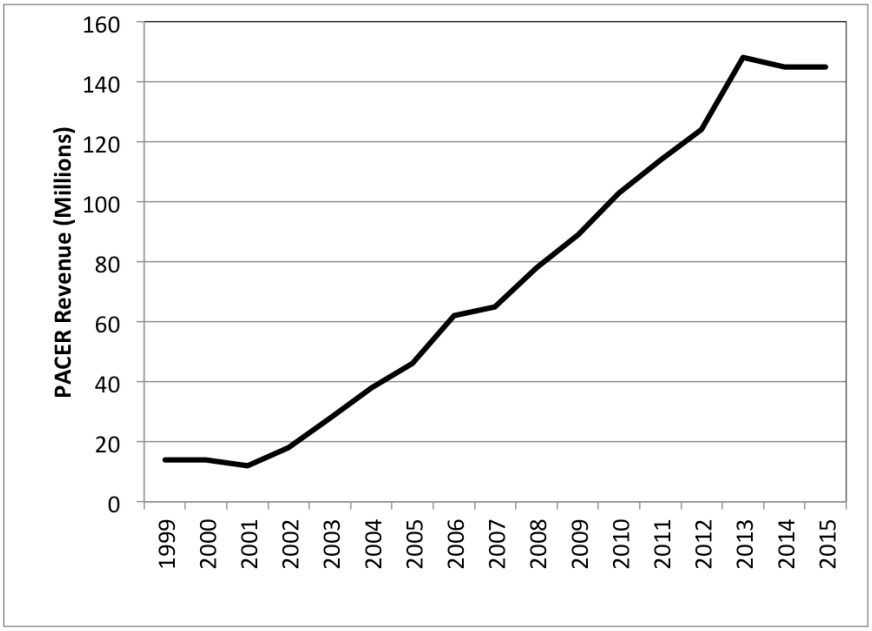
The following year, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. G, at 2.; Statement ¶ 21. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up." *Id.* It has done so because the AO uses the fees to fund "initiatives that are unrelated to providing public access via PACER." *Id.* He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to recover the direct cost of distributing documents via PACER." *Id.* Other technology-related projects, he stressed, "should be funded through direct appropriations." *Id.*

The AO again increases PACER fees. The AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. Statement ¶ 22. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the [ECF] system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." *Id.* But the AO claimed that the fees comply with the E-Government Act because they "are only used for public access." *Id.* It did not elaborate.

C. Use of PACER fees within the class period

From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected over $920 million in PACER fees, with the total annual amount collected increasing from $102.5 million in 2010 to $146.4 million in 2016. *Id.* ¶¶ 28, 46, 62, 80, 98, 116, 134.

The chart below—based entirely on data from the published version of the judiciary's annual budget, *see* ECF No. 8-3, and confirmed by documents provided by the AO in this litigation—illustrates the rapid growth in PACER revenue over the past two decades, a period when "technological innovations," including exponentially cheaper data storage, "should have led to reduced costs." Taylor Decl., Ex. G, at 3; *see also* Lee and Lissner Decl. ¶ 16 (explaining that the cost per gigabyte of storage fell by 99.9%—from $65.37 to $0.028—over this period).[2]



Indeed, the costs of operating the "Electronic Public Access Program"—according to the AO's own records—steeply declined over this period, going from nearly $19 million for fiscal

[2] As a percentage of the judiciary's total budget, however, PACER fees are quite small. Based on the judiciary's budget request of $7.533 billion for fiscal year 2016, PACER fees make up less than 2% of the total budget—meaning that the excess fees are a fraction of a fraction. Matthew E. Glassman, CRS, *Judiciary Appropriations FY2016*, at 1 (June 18, 2015), https://goo.gl/R8QARr.

year 2010 to less than $1 million for fiscal year 2016. Statement ¶¶ 29 & 135. Even including all other expenses designated by the AO as part of the costs of providing "Public Access Services"—including "[d]evelopment and [i]mplementation costs for CM/ECF," "expenses for CM/ECF servers," "costs associated with the support of the uscourts.gov website," and "[c]osts associated with managing the non-technical portion of the PACER Service Center"—the total annual expenses of providing these services ranged between $12 and $24 million over this period. *Id.* ¶¶ 29, 47–48, 63–64, 81–82, 99–100, 117–18, 135–36; *see* Taylor Decl., Ex. L.

The excess PACER fees have been used to fund a variety of programs beyond administering PACER itself. To highlight just a few, the AO used PACER fees to fund the following programs from fiscal year 2010 to 2016:

- $185 million on courtroom technology, Statement ¶¶ 31, 50, 66, 84, 102, 120, 138;
- $75 million to send notices to creditors in bankruptcy proceedings, *id.* ¶¶ 37, 54, 72, 90, 108, 126, 144;
- $9.5 million to provide web-based services to jurors, *id.* ¶¶ 70, 88, 106, 124, 142;
- $3.5 million to send notices to local law-enforcement agencies under the Violent Crime Control Act, *id.* ¶¶ 33, 52, 68, 86, 104, 122, 140; and
- $120,000 for the State of Mississippi study on "the feasibility of sharing the Judiciary's CM/ECF filing system at the state level," *id.* ¶ 35.

Some members of the federal judiciary have been open about the use of PACER revenue to cover unrelated expenses. When questioned during a 2014 House appropriations hearing, representatives from the judiciary admitted that the "Electronic Public Access Program encompasses more than just offering real-time access to electronic records." *Fin. Servs. and Gen. Gov. Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*,

113th Cong. 152 (2014). And Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has acknowledged that the fees "also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat-screen monitor. . . . [There have also been] audio enhancements. . . . This all ties together and it's funded through these [PACER] fees." Panel Discussion, William and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), https://goo.gl/5g3nzo; *see* Statement ¶ 26.

D. This case

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this suit on behalf of themselves and a nationwide class of those similarly situated, asking this Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges.

The Court denied a motion to dismiss in December 2016, rejecting the argument that the suit is barred because a different case had been brought based on PACER fees, and because the plaintiffs did not first present their challenge to the PACER Service Center. *See* ECF No. 25.

In January 2017, this Court certified this case as a class action under Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court certified the following class: "All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities." ECF Nos. 32 & 33. The Court further certified one class claim: "that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under

the Little Tucker Act." *Id.* The class notice period has now ended, and this motion follows the Court's scheduling order of January 24, 2017, *see* ECF No. 34, as modified on July 5, 2017.

ARGUMENT

I. The E-Government Act prohibits the AO from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER.

A. The E-Government Act authorizes the AO to impose PACER fees "as a charge for services rendered"—meaning, as a charge "for electronic access to information" through PACER. 28 U.S.C. § 1913 note. But the AO may do so "only to the extent necessary" "to reimburse expenses in providing these services." *Id.* [3]

The best reading of this statutory language is that it prohibits the AO from charging more than is necessary to recoup the total marginal cost of providing access to records through PACER. That reading is supported not only by the plain text of the law, but also by its statutory history—Congress's decision to amend the law in 2002 to allow fees "only to the extent necessary." And the legislative history makes clear that Congress added this language because it sought to prevent the AO from "charg[ing] fees that are higher than the marginal cost of disseminating the information," as it had been doing for several years, so that records would be "freely available to the greatest extent possible." Statement ¶ 11.

Post-enactment history confirms this straightforward reading. The Act's sponsor has repeatedly expressed his view, in correspondence with the AO's Director, that the law permits the AO to charge fees "only to recover the direct cost of distributing documents via PACER,"

[3] "It is "of no moment" that this law was "codified as a statutory note," rather than as section text. *Conyers v. Merit Sys. Prot. Bd.* 388 F.3d 1380, 1382 n.2 (D.C. Cir. 2004). As noted on the website for the United States Code: "A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note . . . The fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity." Office of the Law Revision Counsel, *Detailed Guide to the United States Code*, at IV(E), http://uscode.house.gov/detailed_guide.xhtml.

and that the AO is violating the Act by charging more in PACER fees than is necessary for providing access to "records using the PACER system." *Id.* ¶¶ 19, 21; 28 U.S.C. § 1913 note. In light of the fact that the Act's text, purpose, and history all point in the same direction, the statute cannot reasonably be read to authorize fees that exceed the costs of administering PACER.

B. Any doubt on this score is dispelled by the background law on federal user fees. Although courts have not yet interpreted the key language in the E-Government Act, there is a long line of cases interpreting an analogous statute: the Independent Offices Authorities Act (or IOAA). This statute authorizes agencies to charge a user fee for "each service or thing of value provided by [the] agency." 31 U.S.C. § 9701(a). Like the E-Government Act, the IOAA's goal is to make agency programs conferring benefits on recipients "self-sustaining to the extent possible." *Id.* It is not to turn them into profit centers to fund agency activities more broadly.

The IOAA's text requires that user fees be "fair" and "based on" four factors: (1) "the costs to the Government," (2) "the value of the service or thing to the recipient," (3) "public policy or interest served," and (4) "other relevant facts." *Id.* § 9701(b). Notwithstanding this potentially limitless language—which is far broader than that found in the E-Government Act—the Supreme Court has declined to read the Act "literally," and has instead interpreted it to forbid agencies from charging fees that exceed the costs of providing the service. *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974); *see Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). As the Court reasoned: "It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read [the IOAA] narrowly as authorizing not a 'tax' but a 'fee.'" *Nat'l Cable Television*, 415 U.S. at 341.

To keep a "fee" from becoming a tax, it must be imposed only "for a service that confers a specific benefit upon an identifiable beneficiary." *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180

(D.C. Cir. 1994). That is, "a user fee will be justified under the IOAA if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 182–83 (D.C. Cir. 1996). This means that the "agency may not charge more than the reasonable cost it incurs to provide [that] service." *Engine Mfrs. Ass'n*, 20 F.3d at 1180; *see Seafarers*, 81 F.3d at 185 ("[T]he measure of fees is the cost to the government of providing the service.").

The reason for this limitation is constitutional. *See Nat'l Cable Television*, 415 U.S. at 342 ("read[ing] the Act narrowly to avoid constitutional problems"). The IOAA permits "agencies to levy fees based on services rendered but not levy taxes, which is the exclusive domain of the legislature." *Jesse E. Brannen, III, P.C. v. United States*, 682 F.3d 1316, 1317 (11th Cir. 2012); *see Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) ("Once agency charges exceed their reasonable attributable cost they cease being fees and become taxes levied, not by Congress, but by an agency," which is "prohibited."). Although Congress may constitutionally delegate its taxing authority, it "must indicate clearly its intention to delegate to the Executive [or the Judiciary] the discretionary authority to recover administrative costs not inuring directly to the benefit" of those paying the costs. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989); *see also Fla. Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).

Here, of course, Congress did not "indicate clearly" any "intention to delegate" taxing authority when it enacted the E-Government Act. If anything, it did the opposite: The Act's text shows that Congress passed the law to *eliminate* excessive PACER fees, not to authorize them. So even if the statutory text were somehow ambiguous, or if Congress could have used even clearer language to express its intention, any ambiguity should be resolved against interpreting the statute in a way that would raise constitutional questions. *See Gomez v. United States*, 490 U.S. 858,

864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

When Congress passed the E-Government Act in 2002, it was familiar with the IOAA's background rule of appropriations, as interpreted by the courts.[4] "Unless there is something in the statute or its legislative history to compel a different result," the settled approach is to read the more specific user-fees statute together with the IOAA as "part of an overall statutory scheme," and "look to the body of law developed under the IOAA for guidance in construing the other statute." 3 GAO, *Principles of Federal Appropriations Law* 12-172 (3d ed. 2008). There is nothing here to indicate that Congress intended a more permissive rule to apply to PACER fees. Quite the contrary, the Act's plain language, statutory history, and legislative history all demonstrate that Congress clearly intended for fees to be restricted to the costs of providing the service for which they are charged—providing access to court records upon demand—and nothing more.

C. This reading is further bolstered by a second constitutional principle: the First Amendment right of access to the courts, and access to court records more specifically. On top of the general limitations on user fees, courts have a special obligation not to assess fees that "unduly burden access to the judicial process." *Id.* 12-157. The Judicial Conference has itself recognized that "public access to federal court case files" implicates these "constitutional principles." Subcomm. on Privacy & Pub. Access to Electronic Case Files, Judicial Conference of the U.S., *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files* (2001), https://goo.gl/G8n6qM (App. A-3) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–78 (1980)). And "[t]he Supreme Court has held that a government cannot profit from imposing" a fee "on the exercise of a First

[4] So was the AO: In a 1997 paper, it emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." Statement ¶ 9.

Amendment right." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943)). When the imposition of a fee implicates First Amendment interests, "fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983); *see also Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (citing cases invalidating fees "in excess of costs of administration"). Notably, this First Amendment jurisprudence on fees mirrors the E-Government Act ("only to the extent necessary").

Thus, for example, when a state imposed a $200 fee "to use a particular piece of state property as a forum for political expression," the Second Circuit held that the "fee [could not] be sustained" because there was "no evidence that the administrative fee charged" was "equal to the cost incurred" for "processing plaintiffs' request to use the property." *Powers*, 723 F.2d at 1056; *see also Sullivan*, 511 F.3d at 38 (finding that a fee exceeded "the actual administrative expenses" and invalidating "the excessive amount charged"); *Fernandes*, 663 F.2d at 633 & n.11 (invalidating a fee for a permit because it exceeded the amount "needed to defray the costs of operating the permit system"). By contrast, the Supreme Court has upheld a parade-permit fee because it was "not a revenue tax," but was instead "limited" to what was necessary "to meet the expense incident to the administration of the [permit] and to the maintenance of public order" during the parade. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); *see also Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) ("[F]ees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible.").

Like the IOAA jurisprudence—and every relevant tool of statutory construction—this First Amendment precedent cuts against interpreting the E-Government Act to allow fees that exceed the marginal cost of providing access to records through PACER. Adopting such an

interpretation would raise serious constitutional concerns, because while the public has a First Amendment interest in accessing the courts, the AO has no legitimate interest in hindering access to court records by imposing an excessive fee in order to pay for other things that should be funded through the appropriations process. *See generally* Stephen Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records* (Aug. 25, 2017) (draft), http://ssrn.com/abstract=3026779; David Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835 (2017), https://ssrn.com/abstract=2883231. Indeed, excessive PACER fees inhibit public understanding of the courts and thwart equal access to justice, erecting a financial barrier that many ordinary citizens are unable to clear. As a result, it is hard to see how excess fees are anything other than an undue burden on public access to courts.

This does not necessarily mean that a statute would actually *be* unconstitutional if it were to expressly allow the judiciary to recoup more than the costs of administering PACER. It is enough that this reading of the E-Government Act would "raise[] a substantial constitutional question." *Peretz v. United States*, 501 U.S. 923, 930 (1991); *see* Antonin Scalia & Bryan Garner, *Reading Law* 247–48 (2012) ("[The constitutional-doubt canon] militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality.").

Rather than interpret the statute in a way that would raise multiple constitutional questions—and run headlong into two walls of precedent—this Court should follow the text and apply the law in the way that Congress intended: to prohibit the AO from "charg[ing] fees that are higher than the marginal cost of disseminating the information." Statement ¶ 11.

II. The AO has violated the E-Government Act by charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER.

There is no doubt that the AO is charging more in fees than is necessary to administer PACER and provide access to records to those who use the system. Congress made this observation when it enacted the E-Government Act, finding that "users of PACER are charged fees that are higher than the marginal cost of disseminating the information." Taylor Decl., Ex. D, at 5. This is even more true today. Since 1998, "the cost of a gigabyte of storage" has fallen "from $65.37 to $0.028, a reduction of over 99.9%," while "PACER's per-page fees increased 43%, from $0.07 to $0.10." Lee & Lissner Decl. ¶ 16. As Senator Lieberman has remarked: "[D]espite the technological innovations that should have led to reduced costs in the past eight years," the "cost for these documents has gone up" because the AO has used the fees to fund "initiatives that are unrelated to providing public access via PACER." Statement ¶ 21. Doing so is "against the requirement of the E-Government Act." *Id.* Indeed, our technical experts estimate that the true cost of retrieving a document from PACER—including the cost of data storage through a secure service used by many federal agencies—should be $0.0000006 per page (about one half of one ten-thousandth of a penny), meaning that the current fees actually collected by PACER could cover the costs associated with "215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States." Lee & Lissner Decl. ¶ 29.

During the class period, the AO has used PACER fees to: (1) upgrade courtroom technology, Statement ¶¶ 31, 50, 66, 84, 102, 120, 138; (2) send notices to creditors in bankruptcy proceedings, *id.* ¶¶ 37, 54, 72, 90, 108, 126, 144; (3) send notices to law-enforcement agencies under the Violent Crime Control Act, *id.* ¶¶ 33, 52, 68, 86, 104, 122, 140; (4) provide online services to jurors, *id.* ¶¶ 70, 88, 106, 124, 142; (5) cover "costs associated with the support of the uscourts.gov website," ¶ 118; and (6) fund a state-court study in Mississippi, *id.* ¶ 35.

None of these projects is remotely part of the marginal cost of making records available through PACER. None "bestows a benefit" on a PACER user that is "not shared by other members of society." *Nat'l Cable Television Ass'n*, 415 U.S. at 341 (interpreting the IOAA). Instead, each of these projects exists to benefit the public at large, or some other group of people. And the AO has admitted as much, asserting in this litigation that the costs of sending bankruptcy notices, for example, are recoverable through PACER because "[e]lectronic bankruptcy noticing improves the overall quality of electronic service *to the public*." Taylor Decl., Ex. M, at 45 (emphasis added); *see also id.* at 50 (attempting to justify spending PACER fees on law-enforcement notices under the Violent Crime Control Act because that program "improves the overall quality of electronic service *to the public* via an enhanced use of the Internet"); *id.* (same, for "E-Juror service"); *id.* at 42 (same, for uscourts.gov website); *id.* at 51 (attempting to justify spending PACER fees on courtroom technology on the theory that better technology "improves the ability to share case evidence with *the public in the courtroom* during proceedings"); *id.* at 53 (attempting to justify spending PACER fees on the Mississippi state-court study because "the costs associated with improving the overall quality of service *to the public* by studying whether CM/ECF could be shared with a state court").

As worthwhile as these projects may be, they "should be funded through direct appropriations," as Senator Lieberman has explained; they may not be funded by PACER users. Taylor Decl., Ex. G, at 3. Allowing the AO to make PACER users fund the judiciary's general electronic operations— including programs that confer no specific and direct benefit on those PACER users—takes the AO "far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Nat'l Cable Television*, 415 U.S. at 341. Congress did not pass the E-Government Act to delegate taxing power to the Administrative Office.

What about the other categories of expenses on which the judiciary spends PACER fees, such as CM/ECF, infrastructure and telecommunications expenses, and "court allotments"? There is a short answer and a long answer. The short answer is that this Court need not decide these questions now because they go to damages rather than liability. The long answer is that the AO has thus far provided only very general information about these programs. Without more detailed information, it is impossible to say whether any of these costs may be recoverable through PACER fees. Some of these costs might be attributable to providing records through PACER, while many will not be. Formal discovery will reveal which expenses fall into the latter category, and which (if any) fall into the former.

For what it is worth, however, the principles we have laid out strongly indicate that CM/ECF and its associated costs may not be funded with PACER fees. To see why, consider an example from before the existence of the Internet. Suppose that the judiciary wanted to allow the public to access court records in the early 1900s, and to charge fees for providing such access. Under a fees-only-to-the-extent-necessary regime, the judiciary could charge fees as necessary to reimburse the costs of searching the files and providing copies of the records, as well as the labor costs associated with these specific services. But the judiciary could not charge fees to reimburse the costs of accepting documents for filing and storing them with the court in the first place, or overhead costs that are not part of the marginal cost of providing public access to the records (much like an agency, in responding to a public-records request today, may not charge a fee that exceeds "the direct costs of search, duplication, or review," 5 U.S.C. § 552 (a)(4)(A)(iv)). These expenses would exist irrespective of whether the records were made publicly accessible, because courts can only function as courts if they have a system for accepting and storing case filings. And the same is true of CM/ECF.

But this is for another day. For now, the only question is whether the AO is charging more than necessary to recoup the costs of operating PACER. The answer is plainly yes. Under even the most permissive conception of what the AO is permitted to charge under the E-Government Act, it is not charging "reasonable fees" "to the extent necessary" to make records available upon request. 28 U.S.C. § 1913 note. As an illustration of just how unreasonable PACER fees are, our experts Tom Lee and Mike Lissner calculate that, if the AO were to use the market leader for data storage, the "total yearly estimate for storing and serving PACER's dataset" (based on very generous estimates of the size of that dataset) would be "$227,399.84, or 0.16% of PACER's reported 2016 fee revenue." Lee & Lissner Decl. ¶ 28. Charging more than 600 times that amount is unreasonable and excessive under any standard.

CONCLUSION

This Court should grant the plaintiffs' motion for summary judgment as to liability.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

William H. Narwold
Meghan S.B. Oliver
Elizabeth Smith
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
(202) 232-5504

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

August 28, 2017

EXHIBIT E

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 21, 2004

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES COURTS
CLERKS, UNITED STATES COURTS

SUBJECT: Electronic Public Access (EPA) Fee Schedule Change (INFORMATION)

The Judicial Conference, at its September 21, 2004 session, amended the language of Section I of the Electronic Public Access Fee Schedule for the appellate, district, and bankruptcy courts, the United States Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation (adopted by the Judicial Conference pursuant to sections 1913, 1914, 1926, 1930, and 1932 of Title 28, United States Code). The amendment increases the PACER Internet access fee from seven cents per page to eight cents per page.

This increase is predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance. The fee increase will enable the judiciary to continue to fully fund the Electronic Public Access Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter.

The fee increase will be **effective on January 1, 2005**. CM/ECF software, which includes the necessary changes to implement the fee increase, will be provided to the courts in mid-November. All courts must install this software release by the end of the calendar year to effect the increase on January 1, 2005. A copy of the new EPA Fee Schedule is attached.

If you have any questions on these matters, please contact Mary M. Stickney, Chief of the EPA Program Office via email at *Mary Stickney/DCA/AO/USCOURTS* or Susan Del Monte, EPA Program Attorney-Advisor via email at *Susan Del Monte/DCA/AO/USCOURTS* or we may be contacted in the Office of Court Administration at (202) 502-1500.

Leonidas Ralph Mecham
Director

Attachment

cc: Circuit Executives
District Court Executives
Clerks, Bankruptcy Appellate Panels

ELECTRONIC PUBLIC ACCESS FEE SCHEDULE (eff. 1/1/05)

As directed by Congress, the Judicial Conference has determined that the following fees are necessary to reimburse expenses incurred by the judiciary in providing electronic public access to court records. These fees shall apply to the United States unless otherwise stated. No fees under this schedule shall be charged to federal agencies or programs which are funded from judiciary appropriations, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrator programs.

I. For electronic access to court data via dial up service: sixty cents per minute. For electronic access to court data via a federal judiciary Internet site: eight cents per page, with the total for any document, docket sheet, or case-specific report not to exceed the fee for thirty pages– provided however that transcripts of federal court proceedings shall not be subject to the thirty-page fee limit. Attorneys of record and parties in a case (including *pro se* litigants) receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. No fee is owed under this provision until an account holder accrues charges of more than $10 in a calendar year. Consistent with Judicial Conference policy, courts may, upon a showing of cause, exempt indigents, bankruptcy case trustees, individual researchers associated with educational institutions, courts, section 501(c)(3) not-for-profit organizations and pro bono ADR neutrals from payment of these fees. Courts must find that parties from the classes of persons or entities listed above seeking exemption have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information. Any user granted an exemption agrees not to sell for profit the data obtained as a result. Exemptions may be granted for a definite period of time and may be revoked at the discretion of the court granting the exemption.

II. For printing copies of any record or document accessed electronically at a public terminal in the courthouse: ten cents per page. This fee shall apply to services rendered on behalf of the United States if the record requested is remotely available through electronic access.

III. For every search of court records conducted by the PACER Service Center, $20.

JUDICIAL CONFERENCE POLICY NOTES

Courts should not exempt local, state or federal government agencies, members of the media, attorneys or others not members of one of the groups listed above. Exemptions should be granted as the exception, not the rule. A court may not use this exemption language to exempt all users. An exemption applies only to access related to the case or purpose for which it was given.

The electronic public access fee applies to electronic court data viewed remotely from the public records of individual cases in the court, including filed documents and the docket sheet. Electronic court data may be viewed free at public terminals at the courthouse and courts may provide other local court information at no cost. Examples of information that can be provided at no cost include: local rules, court forms, news items, court calendars, opinions, and other information – such as court hours, court location, telephone listings – determined locally to benefit the public and the court.

EXHIBIT G

JOSEPH I. LIEBERMAN, CONNECTICUT, CHAIRMAN

CARL LEVIN, MICHIGAN
DANIEL K. AKAKA, HAWAII
THOMAS R. CARPER, DELAWARE
MARK L. PRYOR, ARKANSAS
MARY L. LANDRIEU, LOUISIANA
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA
ROLAND W. BURRIS, ILLINOIS
EDWARD E. KAUFMAN, DELAWARE

SUSAN M. COLLINS, MAINE
TOM COBURN, OKLAHOMA
SCOTT BROWN, MASSACHUSETTS
JOHN McCAIN, ARIZONA
GEORGE V. VOINOVICH, OHIO
JOHN ENSIGN, NEVADA
LINDSEY GRAHAM, SOUTH CAROLINA

MICHAEL L. ALEXANDER, STAFF DIRECTOR
BRANDON L. MILHORN, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

March 25, 2010

The Honorable Richard Durbin
Chairman
Subcommittee on Financial Services and General Government
Committee on Appropriations
184 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
125 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Collins:

Thank you for affording me the opportunity to provide my views. I hope the following recommendations and comments will assist you as your subcommittee deliberates on the Financial Services and General Government Appropriations Bill for Fiscal Year 2011.

Privacy and Civil Liberties Oversight Board

I remain deeply concerned that the Administration has not yet nominated anyone for the Privacy and Civil Liberties Oversight Board, created by the 2004 Intelligence Reform and Terrorism Prevention Act, and reconstituted by the 2007 Implementing Recommendations of the 9/11 Commission Act. The 9/11 Commission recognized that without adequate oversight the vital work of combating terrorism could tread dangerously close to intruding on core rights and liberties, and urged creation of this Board to help advise on and review the nation's policies against terrorism with an eye toward safeguarding key freedoms. While we applaud the hard work of the original Board, in 2007 Congress concluded that the panel needed more independence and reconstituted it as an independent agency outside the Executive Office of the President. Unfortunately, the effort to create a stronger Board has, thus far, resulted in no board at all. I once again urge the President to put forward nominees for the Board without delay, and I urge the Appropriations Committee to fund it at a robust level. The authorizing legislation originally recommended funding of $10 million by FY 2011. While it is questionable that a new Board could effectively spend that much in its first year, I recommend that the Board receive funding to begin as strongly as feasible, certainly well above the President's request of $1.68 million.

Office of Electronic Government and the Electronic Government Fund

This year the Administration requested $35 million in the General Services Administration (GSA) budget for the E-Government Fund for the establishment of pilots relating to cloud computing, collaborative platforms, and transparency and participation. In FY 2009 the Administration rolled out a number of ambitious initiatives, including data.gov, the IT Dashboard, and apps.gov, which have increased transparency and have begun to illustrate the potential for reducing costs and increasing transparency across the government by using information technology. The additional funds requested for FY 2010 will be used to further modernize government systems and pave the way for greater savings. For that reason, I fully support the Administration's request for $35 million for this effort.

In addition, the Administration has requested $50 million for the Integrated, Efficient and Effective Uses of Information Technology fund in the budget for the Office of Management and Budget (OMB). These funds would both further implement pilots originally developed under the E-Government Fund and assist with project management and guidance for information technology projects. While I believe this is an important goal and support the amounts requested, this funding should be included with the $35 million for the statutorily-created E-Government fund – which is required to report to Congress on its expenditures. Funding these initiatives, along with the additional project management tools, will lower costs and allow departments and agencies to provide additional services in less time. As a result, we are likely to see more results from our information technology expenditures and greater savings in future fiscal years.

Given the important role of the E-Government Office in managing these funds and its additional responsibilities, I also believe that the Congress should increase the appropriation for OMB to allow for additional staff for this office. Currently, the E-Government Office has approximately 13 FTEs with the statutory responsibility to manage the information technology budget across the entire Federal government – which will add up to over $79 billion in the FY 2011 budget request. In addition, the E-Government Office has responsibilities – shared with the Department of Homeland Security – over the security of Federal information systems, but has limited staff to assist in this key priority. Given the office's role, I recommend that the budget for OMB be increased by $3 million to allow for the hiring of additional staff in the E-Government Office.

Public Access to Court Electronic Records (PACER)

I have concerns about how the Administrative Office of the Courts is interpreting a key provision of the E-Government Act relating to public access to Court records. Given the transparency efforts that have been made a priority across the Federal Government - as well as the recent call in the FCC's Broadband plan for increased online access to court records - I believe more attention needs to be paid to make these records free and easily accessible.

As you know, Court documents are electronically disseminated through the PACER system, which charges $.08-a-page for access. While charging for access was previously

required, Section 205(e) of the E-Government Act changed a provision of the Judicial Appropriation Act of 2002 (28 U.S.C. 1913 note) so that courts "may, only to the extent necessary" (instead of "shall") charge fees "for access to information available through automatic data processing equipment." The Committee report stated: "[t]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible... Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."

Since the passage of the E-Government Act, the vision of having information "freely available to the greatest extent possible" is far from being met, despite the technological innovations that should have led to reduced costs in the past eight years. In fact, cost for these documents has gone up, from $.07 to $.08-per-page. The Judiciary has attempted to mitigate the shortcomings of the current fee approach in a variety of ways, including limiting charges to $2.40-per-document and the recent announcement that any charges less than $10-per-quarter will be waived. While these efforts should be commended, I continue to have concerns that these steps will not dramatically increase public access as long as the pay-per-access model continues.

To move closer to the mandate of the E-Government Act, the Administrative Office of the Courts should reevaluate the current PACER pay-per-access model. Even to retrieve free materials such as opinions, PACER currently requires the individual to establish a PACER account. One goal of this review should be to create a payment system that is used only to recover the direct cost of distributing documents via PACER. That review should also examine how a payment system could allow for free bulk access to raw data that would allow increased analytical and oversight capability by third parties.

Additionally, in 2007, the Judiciary asked for and received written consent from the Appropriations Committees to "expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." As a result, funds collected by the $.08-per-page charge have been used for initiatives that are unrelated to providing public access via PACER and against the requirement of the E-Government Act. The Appropriations Committee should review the Judiciary Information Technology Fund Report provided each year to ensure the funds generated from PACER are only going to pay for the direct costs of disseminating documents via PACER, and not for additional items which I believe should be funded through direct appropriations.

Modernization of Acquisition Systems

I support the President's request for an additional $20.5 million for the General Services Administration for the purpose of modernizing the Integrated Acquisition Environment (IAE), which consists of eight major data systems, including the Federal Procurement Data System, Federal Business Opportunities (FedBizOpps.gov), the Excluded Parties List, and the Past Performance Information Retrieval System. These systems support over 40,000 federal procurement professionals, 600,000 vendors, over $523 billion in annual procurement spending, and over eight million transactions per year. Unfortunately, despite depending on the same

underlying data, these systems were developed over the years in a stove-piped manner and therefore are disjointed and difficult to use. Modernization of IAE will help the federal acquisition workforce make smarter contracting decisions and ensure that contracts are not awarded to irresponsible parties or to companies that have been debarred or suspended. In addition, providing easier access to information about federal procurement opportunities would enhance competition by attracting a larger pool of potential bidders. Finally, a modernized IAE would provide greater transparency to the American public and the Congress on federal contract spending. I am convinced that this investment in IAE will pay for itself over time.

Acquisition Workforce

The President's budget requests $24.9 million for the General Services Administration for government-wide efforts to strengthen the acquisition workforce through better training, certification, and workforce management. The number of acquisition professionals in the federal government simply has not kept pace with the explosive growth in federal contracting over the last decade. Moreover, more than half of the acquisition workforce will be eligible to retire over the next eight years. We therefore are fast approaching a crisis unless we recruit and train a skilled workforce that can promote competition, get the best value for the government, and guard against waste, fraud and abuse in federal contracting. I understand that there may be some unobligated balances in the Acquisition Workforce Training Fund that may be available to help fund the President's proposed initiative. While taking those funds into account, I urge the Committee to provide a sufficient amount to fund the proposed initiative.

Office of Federal Procurement Policy

I am extremely concerned that the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget lacks adequate personnel to carry out its mission of providing overall government-wide direction for procurement policies, regulations, and procedures. While total federal spending on goods and services has risen dramatically over the last decade, from $189 billion in 1999 to over $523 billion in 2009, the staffing level at OFPP has remained stagnant at roughly a dozen FTE's, including administrative support. Both under legislative mandate and at President Obama's direction, OFPP is responsible for reducing waste and abuse in contracting by promoting competition, preventing misuse of cost-plus contracts, bringing rationale to the interagency contracting process, mitigating conflicts of interest, and ensuring that inherently-governmental work is performed by federal employees. Each of these areas is highly complex and requires strong government-wide leadership from OFPP to bring greater efficiency and integrity to federal contracting. I therefore recommend that, at a minimum, the appropriation for OFPP be doubled, from $3 million to $6 million.

United States Postal Service

The United States Postal Service (USPS or Postal Service) continues to experience accelerated declines in mail volume and revenue, primarily due to the current economic crisis and the electronic diversion of mail. In fiscal year 2009, the Postal Service recorded a loss of $3.8 billion and USPS ended the first quarter of this fiscal year (October 1 to December 31,

2009) with a net loss of $297 million. The Postmaster General recently indicated that, without substantial changes, losses will be even more substantial going forward.

Therefore, as Congress works with the Postal Service on long-term solutions, I recommend that we consider providing the Postal Service with additional financial relief in FY 2011. One option, recommended by the Postal Service, is to allow USPS to restructure its required payments into the Postal Service Retiree Health Benefits Fund. Currently, the Postal Accountability and Enhancement Act (P.L. 109-435) requires the Postal Service to pre-pay its retiree health benefits obligations for future retirees into the Fund, while it makes payments for current retirees. Thus, restructuring the Postal Service's payments into the Fund would provide USPS with financial relief during this economic downturn.

National Archives and Records Administration (NARA)

I support the $460 million in the President's budget request for the National Archives and Records Administration (NARA). The role of the National Archives in protecting and preserving our national heritage continues to be critical – particularly as the number of records it preserves and protects increases exponentially. Furthermore, in recent years, NARA has received many additional responsibilities, including the establishment of the National Declassification Center last year and the creation of the Office of Government Information Services to oversee Freedom of Information Act activities government-wide. In 2008, NARA was designated as the lead agency for the implementation of the Controlled Unclassified Information (CUI) framework, which is intended to streamline the use of sensitive, unclassified information within the federal government.

I also believe that the appropriation for the National Historical Publications and Records Commission (NHPRC) should be increased from $10 million to $13 million. The NHPRC supports the efforts of NARA to preserve and publish any material relating to the history of the United States. In the last Congress, this Committee passed the Presidential Historical Records Preservation Act of 2008 (P.L. 110-404), which gave additional responsibilities to the NHPRC to make grants to preserve records of former Presidents, provide online access to the documents of the founding fathers, and create a database for records of servitude, emancipation, and post-Civil War reconstruction. I believe these important missions require additional funding for the Commission to allow it to also continue its traditional role in protecting the records that define this country.

* * * * *

I appreciate this opportunity to comment on issues of concern to the Committee on Homeland Security and Governmental Affairs.

Sincerely,

Joseph I. Lieberman
Chairman

EXHIBIT H

JOSEPH I. LIEBERMAN, CONNECTICUT, CHAIRMAN

CARL LEVIN, MICHIGAN
DANIEL K. AKAKA, HAWAII
THOMAS R. CARPER, DELAWARE
MARK L. PRYOR, ARKANSAS
MARY L. LANDRIEU, LOUISIANA
BARACK OBAMA, ILLINOIS
CLAIRE McCASKILL, MISSOURI
JON TESTER, MONTANA

SUSAN M. COLLINS, MAINE
TED STEVENS, ALASKA
GEORGE V. VOINOVICH, OHIO
NORM COLEMAN, MINNESOTA
TOM COBURN, OKLAHOMA
PETE V. DOMENICI, NEW MEXICO
JOHN WARNER, VIRGINIA
JOHN E. SUNUNU, NEW HAMPSHIRE

MICHAEL L. ALEXANDER, STAFF DIRECTOR
BRANDON L. MILHORN, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

February 27, 2009

The Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Rosenthal:

I am writing to inquire if the Court is complying with two key provisions of the E-Government Act of 2002 (P.L. 107-347) which were designed to increase public access to court records and protect the privacy of individuals' personal information contained in those records.

As you know, court documents are electronically released through the Public Access to Court Electronic Records (PACER) system, which currently charges $.08 a page for access. While charging for access was previously required, Section 205(e) of the E-Government Act changed a provision of the Judicial Appropriation Act of 2002 (28 U.S.C. 1913 note) so that courts "may, to the extent necessary" instead of "shall" charge fees "for access to information available through automatic data processing equipment."

The goal of this provision, as was clearly stated in the Committee report that accompanied the Senate version of the E-Government Act, was to increase free public access to these records. As the report stated: "[t]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. ... Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."

Seven years after the passage of the E-Government Act, it appears that little has been done to make these records freely available – with PACER charging a higher rate than 2002. Furthermore, the funds generated by these fees are still well higher than the cost of dissemination, as the Judiciary Information Technology Fund had a surplus of approximately $150 million in FY2006.[1] Please explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging "to the extent necessary" for records using the PACER system.

In addition I have concerns that not enough has been done to protect personal information contained in publicly available court filings, potentially violating another provision of the

[1] Judiciary Information Technology Fund Annual Report for Fiscal Year 2006

E-Government Act.[2] A recent investigation by Carl Malamud of the non-profit Public.Resource.org found numerous examples of personal data not being redacted in these records. Given the sensitivity of this information and the potential for indentify theft or worse, I would like the court to review the steps they take to ensure this information is protected and report to the Committee on how this provision has been implemented as we work to increase public access to court records.

I thank you in advance for your time and I look forward to your response.

Sincerely,

Joseph I. Lieberman
Chairman

[2] Section 205(c)(3) requires that rules be developed to "protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically."

EXHIBIT I

RECEIVED
CH DATE 3/31

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

March 26, 2009

Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are responding on behalf of the Judicial Conference and its Rules Committees to your letter to Judge Lee H. Rosenthal dated February 27, 2009. Your letter raises two questions about the Judiciary's compliance with the E-Government Act of 2002: the first involves the fees charged for Internet-based access to court records, to which Director Duff responds; and the second relates to the protection of private information within these court records, to which Judge Rosenthal responds. The Judiciary welcomes the opportunity to address these issues.

User Fees Necessary to Support PACER

You inquired whether the Judiciary's Public Access to Court Electronic Records (PACER) system complies with a provision of the E-Government Act that contemplates a fee structure in which electronic court information "is freely available to the greatest extent possible." We assure you that the Judiciary is charging PACER fees only to the extent necessary. As described below, many services and documents are provided to the public for free, and charges that are imposed are the minimum possible only to recover costs. As such, we believe we are meeting the E-Government Act's requirements to promote public access to federal court documents while recognizing that such access cannot be entirely free of charge.

There are high costs to providing the PACER service. This fact raises an important question of who should pay for the costs — taxpayers or users. Congress initially answered the question in our 1991 appropriations act when it required that improved electronic access to court information be funded through reasonable fees paid by the users of the information, and not through taxes paid by the general public. That requirement is the basis for the current Electronic Public Access (EPA) program, and for the fees charged for access to federal court documents through the PACER system.

The PACER user population includes lawyers, *pro se* filers, government agencies, trustees, bulk collectors, researchers, educational institutions, commercial enterprises, financial institutions, the media, and the general public. The fees are the same for all users of the system. The program does not, however, provide free access to every individual, law firm, or corporation (most notably data resellers and credit reporting firms) that is interested in obtaining vast amounts of court data at no cost.

As noted above, Congress mandated 18 years ago that the Judiciary charge user fees for electronic access to court files as a way to pay for this service. Since that time, various legislative directives have amended the mandate, mostly to expand the permissible use of the fee revenue to pay for other services related to the electronic dissemination of court information, such as the Case Management/Electronic Case Files (CM/ECF) system[1] and an Electronic Bankruptcy Noticing (EBN) system.[2] Your letter correctly notes that the E-Government Act shifted emphasis by providing that fees "may," rather than "shall," be collected, and "only to the extent necessary." It did not, however, alter Congress's policy that the EPA program recoup the cost of services provided through a reasonable fee. Indeed, the Conference Report on the Judiciary Appropriations Act of 2004, adopted two years after the E-Government Act, included the following statement: "[t]he Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs."[3] Consistent with that directive, the Judicial Conference increased the EPA fee by one cent per page accessed.

The Judiciary takes its responsibility to establish the EPA fee very seriously. Since well before the E-Government Act, it has been the Judicial Conference's policy to set the electronic public access fee to be commensurate with the costs of providing and enhancing services related to public access. In fact, prior to the one-cent per-page increase in 2004, the Conference had a history of lowering the fee. As a result, PACER is a very economical service:

- The charge for accessing filings is just eight cents per page (as opposed to the fees for using commercial services such as Westlaw or Lexis, which are much more);

---

[1] CM/ECF, the primary source of electronic information on PACER, was developed and is maintained with EPA fees. This system provides for electronic filing of all documents in all 94 district courts and all 90 bankruptcy courts, and currently is being implemented in the courts of appeals.

[2] The EBN system is funded in its entirety by EPA fee revenue. It provides access to bankruptcy case information to parties listed in the case by eliminating the production and mailing of traditional paper notices and associated postage costs, while speeding public service. Available options include Internet e-mail and fax services, and Electronic Data Interchange for large volume notice recipients. Over 20 million bankruptcy notices were transmitted through the EBN program in fiscal year 2008.

[3] *See* H.R. Rpt. No. 108-401, 108th Cong., 1st Sess., at 614 (adopting the language of H.R. Rpt. No. 108-221, 108th Cong., 1st Sess., at 116).

- There is a $2.40 maximum charge for any single document, no matter its length; and

- At federal courthouses, public access terminals provide free PACER access to view filings in that court, as well as economical printouts (priced at $.10 per page).

In addition, contrary to the notion that little has been done to make court records freely available, the Electronic Public Access (EPA) program *does* provide a significant amount of federal court information to the public for free. For example, through PACER:

- Free access to all judicial opinions is provided;

- Parties to a court case receive a free copy of filings in the case;

- If an individual account does not reach $10 annually (which translates into access to at least 125 pages), no fee is charged at all – in 2008, there were over 145,000 accounts in this status; and

- Approximately 20 percent of all PACER usage is performed by users who are exempt from any charge, including indigents, academic researchers, CJA attorneys, and *pro bono* attorneys.[4]

Nonetheless, the fact remains that the EPA program does require funding, and Congress has never provided appropriations for its support. If the users, the largest of which are finance and information management corporations, are not charged for the services they receive, the Judiciary cannot maintain PACER or other public access facilities unless Congress annually provides taxpayer-funded appropriations to support the program.

Additionally, a misconception about PACER revenues needs clarification. There is *no* $150 million PACER surplus; the figure referenced in your correspondence was a FY 2006 balance of $146.6 million in the much larger Judiciary Information Technology Fund (JITF). The JITF finances the IT requirements of the entire Judiciary and is comprised primarily of "no-year" appropriated funds which are expected to be carried forward each year. While fee

---

[4] In addition to these examples, the EPA program provides free access to court case information through VCIS (Voice Case Information System), an automated voice response system that provides a limited amount of bankruptcy case information directly from the court's database in response to touch-tone telephone inquiries. The Judicial Conference also recently attempted to expand free PACER access through a pilot project that provided PACER terminals in Federal Depository Libraries. The purpose of the pilot was to provide access to individuals who would be unlikely to go to the courthouse, have ready access to the Internet, or establish a PACER account. Unfortunately, after only 11 months, the pilot had to be suspended pending an evaluation and an investigation of potentially inappropriate use.

collections from the EPA program are also deposited into the JITF, they are used only to fund electronic public access initiatives and account for only a small portion of its balance.[5]

Finally, the Judiciary is making a serious effort to implement the requirements of the E-Government Act. Section 205(d) directed the Judicial Conference to "explore the feasibility of technology to post online dockets with links allowing all filings, decisions and rulings in each case to be obtained from the docket sheet of that case." In reality, the Judiciary has done much more than "explore" such technology — *we have designed and now implemented in all courts a system that provides nearly one million PACER users with access to over 250 million case file documents at a reasonable fee, and frequently free of any charge at all.* The EPA program was developed as an alternative to going to the courthouse during business hours and making copies at the cost of 50 cents a page.

In contrast, very few state courts have electronic access systems, and none provides as much information as PACER. Many state courts charge several dollars for a single records search. We receive frequent inquiries from state court officials and court administrators from other countries about PACER, which is viewed as an electronic public access model. Taxpayers, who incur none of the expenses associated with PACER, and users of the system, who enjoy rapid access to a vast amount of docket information, are well served by PACER. The PACER system is an on-going success story and the Judiciary remains committed to providing a high level of electronic public access to court information.

Private Information in Electronic Court Records

The Judicial Conference and its Rules Committees share your commitment to protecting private information in court filings from public access. Over a decade ago, before electronic filing was adopted in the federal district and bankruptcy courts and well before enactment of the E-Government Act of 2002, the Conference began developing a policy to protect private information in electronic case files while ensuring Internet-based public access to those files. That policy became effective in September 2001. Changes to the Federal Appellate, Bankruptcy, Civil, and Criminal Rules, largely incorporating the privacy policy and addressing other rules' aspects of protecting personal identifiers and other public information from remote electronic public access, became effective in December 2007, under the E-Government Act and pursuant to the Rules Enabling Act process.[6]

The Judicial Conference has continued to examine how the privacy policy and rules are working in practice. Two Conference committees are reviewing the rules, the policy, and their implementation. The Administrative Office of the United States Courts has also continued

---

[5] The carryover JITF balances (including the portion attributable to EPA fee collections) have been substantially reduced since FY 2006 in order to meet the Judiciary's IT requirements.

[6] Fed. R. App. P. 25(a)(5); Fed. R. Bankr. P. 9037; Fed. R. Civ. P. 5.2; and Fed. R. Crim. P. 49.1.

to reinforce effective implementation. The Federal Judiciary has been in the forefront of protecting privacy interests while ensuring public access to electronically filed information.

In late 1999, a few federal courts served as pilot projects to test electronic filing. In 2009, the Judiciary's CM/ECF system has become fully operational in 94 district courts and 93 bankruptcy courts, and it will soon become operational in all 13 courts of appeals. As courts and litigants have acquired experience with nationwide electronic filing, new issues have emerged on how to balance privacy interests with ensuring public access to court filings.

The Judiciary-wide privacy policy was adopted in September 2001 after years of study, committee meetings, and public hearings. The policy requires that court filings must be available electronically to the same extent that they are available at the courthouse, provided that certain personal identifiers are redacted from those filings by the attorney or the party making the filing. The personal identifiers that must be redacted include the first five digits of a social-security number, financial account numbers, the name of a minor, the date of a person's birth, and the home address in a criminal case. These redaction requirements were incorporated into the Federal Rules amendments promulgated in December 2007 after the public notice and comment period prescribed under the Rules Enabling Act. These rules, which also address other privacy protection issues, meet the requirements of the E-Government Act.

The 2001 Conference policy and the 2007 privacy rules put the responsibility for redacting personal identifiers in court filings on the litigants and lawyers who generate and file the documents. The litigants and lawyers are in the best position to know if such information is in the filings and, if so, where. Making litigants and lawyers responsible to redact such information has the added benefit of restraining them from including such information in the first place. Moreover, requiring court staff unilaterally to modify pleadings, briefs, transcripts, or other documents that are filed in court was seen to be impractical and potentially compromising the neutral role the court must play. For these reasons, the rules clearly impose the redaction responsibility on the filing party. The Committee Notes accompanying the rules state: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing."[7] The courts have made great efforts to ensure that filers are fully aware of their responsibility to redact personal identifiers. Those efforts continue.

The reported instances of personal identifier information contained in court filings is disturbing and must be addressed. The Rules Committees' Privacy Subcommittee, which developed and proposed the 2007 privacy rules, is charged with the task of examining how the rules have worked in practice, what issues have emerged since they took effect on December 1, 2007, and why personal identifier information continues to appear in some court filings. The

---

[7] Fed. R. Civ. P. 5.2 (Committee Note).

Privacy Subcommittee, which includes representatives from the Advisory Rules Committees as well as the Court Administration and Case Management Committee, will consider whether the federal privacy rules or the Judicial Conference privacy policy should be amended and how to make implementation more effective. The subcommittee will review empirical data; the experiences of lawyers, court staff, and judges with electronic court filings; the software programs developed by some district and bankruptcy courts to assist in redacting personal identifier information; and other steps taken by different courts to increase compliance with the privacy rules.

While this work is going on, the Judiciary is taking immediate steps to address the redaction problem. Court personnel have been trained in administering the privacy policy and rules; additional training is taking place. On February 23, 2009, the Administrative Office issued a written reminder to all Clerks of Court about the importance of having personal identifiers redacted from documents before they are filed and of the need to remind filers of their redaction obligations. Court clerks were directed to use a variety of court communications, such as newsletters, listservs, continuing legal education programs, and notifications on websites administered directly by the courts, to reach as many filers as possible, as effectively as possible. Plans are underway to modify the national CM/ECF system to include an additional notice reminding filers of their redaction obligation. In addition, all the courts have been asked to provide information on their experience with the privacy policy and rules. Early responses have included some promising approaches that the Privacy Subcommittee will consider for possible national adoption.

The Privacy Subcommittee does not underestimate the difficulty or complexity of the problems. Court filings can be voluminous. Some cases involve hundreds or even thousands of pages of administrative or state-court paper records that cannot be electronically searched. Redacting personal identifier information in certain criminal proceedings may interfere with legitimate law enforcement prosecutions. Erroneously redacting information can affect the integrity of a court record. The propriety of court staff changing papers filed in private civil litigation is an ongoing concern. Internet access to court filings present other privacy and security issues besides the redaction of the personal identifiers specified in the 2007 rules, and these issues need to be studied as well.

The resolution of these privacy issues will involve important policy decisions that require careful and comprehensive consideration and input from the bench, bar, and public. The Judicial Conference and its Rules Committees look forward to continuing this dialogue with you.

* * *

If we may be of assistance to you in either of these areas, or on any other matter, please do not hesitate to contact the Office of Legislative Affairs in the Administrative Office at 202-502-1700.

Sincerely,

Lee H. Rosenthal
Chair, Standing Committee on
Rules of Practice and Procedure

James C. Duff
Secretary, Judicial Conference
of the United States

EXHIBIT J

Electronic Public Access Program Summary
December 2012

Program Overview
The Electronic Public Access program provides public access to court information through electronic means in accordance with federal statutes, Judiciary policies, and user needs. The Internet-based PACER (Public Access to Court Electronic Records) service provides courts, litigants, and the public with access to dockets, case reports, and over 500 million documents filed in federal courts through the Case Management and Electronic Case Files (CM/ECF) system. In other words, PACER is a portal to CM/ECF, which in turn, is integral to public access.

A PACER account is obtained by registering with the PACER Service Center, the Judiciary's centralized registration, user support and billing center. Registration information can be submitted via fax or the Internet, and there is no registration fee. At present, there are more than 1.4 million user accounts, with approximately 13,000 new accounts added each month. In fiscal year 2012 alone, PACER processed over 500 million requests for information.

As mandated by Congress, the public access program is funded entirely through user fees set by the Judicial Conference of the United States. The fees are published in the Electronic Public Access Fee Schedule, available on www.uscourts.gov and www.pacer.gov. Funds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology.

Court Websites
Each federal court uses its website, funded by fee revenue, to provide the public with access to information well beyond that which is required by the E-Government Act of 2002, such as court locations, contact information, local rules, standing or general orders, docket information, written opinions, and documents filed electronically. The courts are also using their websites to disclose information about judges' attendance at privately-funded seminars, orders issued on judicial conduct and disability complaints, and digital audio recordings of oral arguments heard by the court. Additionally, court websites provide general information concerning court operations, filing instructions, courthouse accessibility, interpreter services, job opportunities, jury information, and public announcements. Court websites are used to interact directly with the public through PACER, CM/ECF, on-line jury questionnaires, *pro se* filing tools, forms, and court calendars.

CM/ECF and the Next Generation

Implementation of the federal Judiciary's Case Management/Electronic Case Files system (CM/ECF) began in 2001 in the bankruptcy courts after several years of pilot programs in bankruptcy and district courts. CM/ECF not only replaced the courts' old electronic docketing and case management systems, but it also enabled courts to maintain case file documents in electronic format and to accept filings from court practitioners via the Internet. The CM/ECF system is now in use in all of the federal appellate, district, and bankruptcy courts, the Court of International Trade, and the Court of Federal Claims. Nearly 43 million cases are on CM/ECF, and more than 600,000 attorneys and others have filed documents over the Internet.

Attorneys are able to file documents directly with any federal court over the Internet. There are no added fees for filing documents using CM/ECF. The CM/ECF system uses standard office computer hardware, an Internet connection and a browser, and accepts documents in portable document format (PDF). The system is easy to use – filers prepare a document using conventional word processing software, then save it as a PDF file. After logging onto the court's web site with a court-issued CM/ECF password, and acknowledging that the filing complies with the redaction rules, the filer enters basic information relating to the case and document being filed, attaches the document, and submits it to the court. A notice verifying court receipt of the filing is generated automatically and immediately. All electronically filing parties[1] in the case automatically receive immediate e-mail notification of the filing.

Work on the Next Generation of CM/ECF (Next Gen) is well underway. The project is currently transitioning from its first phase – requirements definition – to its second phase – design and development. As part of the requirements definition phase, the Judiciary gathered extensive information from stakeholders both inside and outside the court system. The NextGen project included an Additional Stakeholders Functional Requirements Group (ASFRG) that focused on how the federal courts interact with others in the legal system. The group's 24 members included representatives from the Judiciary, the Department of Justice, the American Bar Association, the Internal Revenue Service, the Association of American Law Schools, and the National Association of Bankruptcy Trustees.

The group reached out to more than 60 constituent groups in a variety of ways, such as focus group meetings, interviews, conferences, surveys, and elicitation sessions at the courts and the Administrative Office. In all, more than 7,000 individual stakeholders provided input, most of which focused on the same core requirements sought in NextGen.

[1] Those parties who are not electronic filers receive notification via U.S. mail.

These core requirements include single sign-on, enhanced search capabilities, batch-filing features, and customizable reports. Nearly 500 of the ASFRG's requirements have been adopted and incorporated into the functional requirements documents being used to design NextGen. The final report of the ASFRG is available to the public on www.uscourts.gov.

The first releases of the Next Generation of CM/ECF are expected in 2014 and 2015, and the requirements prioritized for those releases are associated with time-saving and/or cost-saving functionality. The Next Generation of CM/ECF will also enable additional improvements to the PACER service, including an updated user interface.

Access to Court Records

Registered PACER account holders can use a court's website or the PACER Case Locator to access court documents. The PACER Case Locator is a tool for locating court records that reside in U.S. district, bankruptcy, and appellate court CM/ECF databases across the country. Usage of the Case Locator continues to grow, with over 200,000 searches daily. Links to all courts and the PACER case locator are located at www.pacer.gov. Each court maintains its own CM/ECF database with case information. As a result, querying information from each court is comparable; however, the format and content from each court may differ slightly.

The Judiciary continues to seek to improve electronic public access to its records, and a number of initiatives have been put into place to broaden public access, including:

> *Public Access Terminals* – Every courthouse has public access terminals in the clerk's office to provide access to PACER[2] and other services, such as credit counseling.
>
> *Digital Audio* – At its March 2010 meeting, the Judicial Conference endorsed a proposal from the Committee on Court Administration and Case Management to allow judges, who use digital audio recording as the official means of taking the record, to provide, at their discretion, access to digital audio recordings of court proceedings via PACER. The digital audio initiative, also known as CourtSpeak, continues to be successful, both in terms of public and court interest. Presently, nineteen bankruptcy courts and two district courts have implemented digital audio, and an additional 23 bankruptcy courts, five district courts, and the Court of

[2] Viewing court records at a public access terminal is free. Printing copies of documents from a public access terminal is $0.10 per page.

Federal Claims have begun implementation. The fee for an audio file is $2.40, regardless of the length of the recording.

Training and Education Program – In September 2010, the Judicial Conference approved a recommendation from the Committee on Court Administration and Case Management to establish a program involving the Government Printing Office (GPO), the American Association of Law Libraries (AALL), and the Administrative Office, that would provide training and education to the public about the PACER service, and would exempt from billing the first $50 of quarterly usage by a library participating in the program. The GPO and the AALL worked with the Administrative Office to develop three levels of training classes: training for trainers, training for library staff, and training for the public. There are currently 12 libraries participating in the program. In some instances, libraries are providing on-the-spot individual training. All training classes include instructions on *How to Create a PACER Account* and *How to Monitor PACER Usage*. Although some patrons expressed disappointment that they were not being allowed to use the library's PACER account, but instead had to use their own accounts, they did report being satisfied with the instructions provided. The AALL and the GPO continue to publicize the program to their communities.

PACER Training Application – The training site dcecf.psc.uscourts.gov enables the public to learn how to use PACER without registering or incurring any fees. In March 2012, the Administrative Office also launched video tutorials to assist the public in learning how to use PACER.

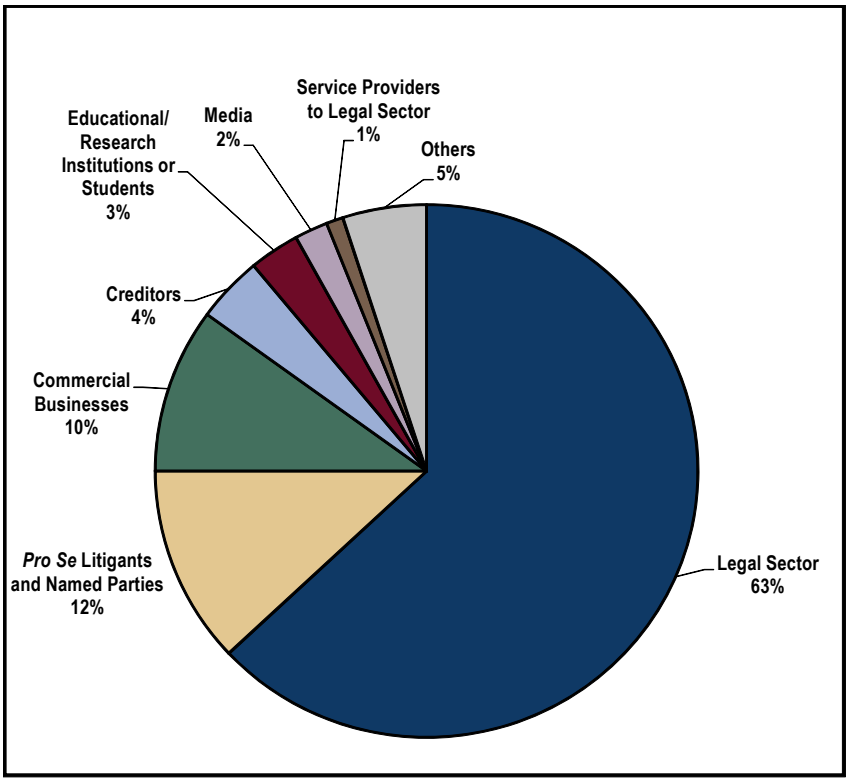
RSS – In addition to PACER access, which allows users to "pull" information from the courts, approximately 50 district courts and 80 bankruptcy courts are using a common, free internet tool, RSS, to "push" notification of docket activity to users who subscribe to their RSS feeds, much like a Congressional committee might notify its RSS subscribers of press releases, hearings, or markups.

Pro Se Bankruptcy Pathfinder – In August 2010, the CM/ECF Subcommittee of the Committee on Court Administration and Case Management approved a proposal to undertake a bankruptcy *pro se* pathfinder initiative, which is designed to assist *pro se* litigants in preparing the filings required at case opening, to reduce the time required to process *pro se* bankruptcy filings, to increase the quality of the data collected, and to employ new development tools today, which are selected for future federal Judiciary use. Three bankruptcy courts currently serve as beta courts: Central District of California, District of New Jersey, and District of New Mexico. It is anticipated that this software will be available for use by filers later this year.

Opinion Initiative with the Government Printing Office – In September 2012, the Judicial Conference of the United States approved national implementation of the program to provide access to court opinions via the Government Printing Office's Federal Digital System (FDSys) and agreed to encourage all courts, at the discretion of the chief judge, to participate in the program. Twenty-nine pilot courts are live, with over 600,000 individual court opinions available on FDSys. This has proved to be extremely popular with the public. Federal court opinions are one of the most utilized collections on FDsys, which includes the Federal Register and Congressional bills and reports. Access to FDSys is available free of charge via the Internet at www.gpo.gov. Registration is not required.

PACER Users

PACER has a diverse user population, including: lawyers; *pro se* filers; government agencies; trustees; bulk collectors; researchers; educational institutions; commercial enterprises; financial institutions; the media; and the general public. The chart below is a breakdown of the PACER user population. The majority of "other" users are background investigators.



The largest user is the Department of Justice. Virtually all of the other high volume users are major commercial enterprises or financial institutions that collect massive amounts of data, typically for aggregation and resale.

Electronic Public Access Service Assessment
A comprehensive assessment of PACER services was completed in May 2010. The assessment provided insight into who uses PACER, areas that provide the highest level of satisfaction for those users, and areas that could be improved. The initial assessment was also used to inform the work of the Additional Stakeholders Functional Requirements Group (ASFRG) as it began identifying requirements for the Next Generation of CM/ECF. An on-line satisfaction survey was made available to all 325,000 active PACER users in late 2009. User types giving the highest overall satisfaction scores to PACER included creditors and service providers to the legal sector, followed by commercial businesses. Users in the legal sector and litigants—the two largest groups of PACER users—are also among the most satisfied. Users at educational and research institutions gave the lowest overall satisfaction rating. These are small groups of less-frequent users. The survey indicated that satisfaction rates climb steadily as frequency of use increases.

In addition to assessing satisfaction with the on-line component of PACER, users were asked to rate help-desk services provided by the PACER Service Center. Satisfaction was very high; over 95 percent of respondents who contacted the center during the study period indicated they are "satisfied" or "very satisfied" overall. However, about one-third of PACER users were not aware that the PACER Service Center is available to provide help with PACER. The assessment also revealed that 75 percent of users were satisfied with the value for the money they paid for PACER access, 15 percent were neutral, and 10 percent were dissatisfied.

As a result of the assessment, a number of short- and mid-term activities were implemented to improve user satisfaction with electronic public access services. These included:

- creating a new PACER Case Locator with expanded search capabilities to replace the U.S. Party/Case Index;
- redesigning the pacer.gov web page to include video tutorials;
- embarking on a program to provide public access to judicial opinions via the Government Printing Office's Internet-based FDSys Application;
- partnering with law libraries to provide training on the efficient and effective use of PACER;
- creating a free PACER training application, which is populated with actual court cases and case reports from the New York Western District Court;
- promoting the use of RSS feeds to "push" information to users;
- creating a mobile PACER application;
- redesigning the PACER bill and providing a tool to better manage billing for large organizations; and

- providing access to some audio recordings of judicial proceedings through PACER.

In April 2012, an initiative was undertaken to refresh the results from the initial assessment. This initiative is on track to meet its scheduled completion date of March 2013.

Basis and History of Fees

In 1988, the Judiciary sought funding through the appropriations process to provide electronic public access services. Rather than appropriate funds for this purpose, Congress specifically directed the Judiciary to fund electronic public access services through the collection of user fees. As a result, the electronic public access program relies exclusively on fee revenue. The statutory language specifically requires that the fees be used "to reimburse expenses incurred in providing these services."[3]

A study of policies and practices regarding use, release, and sale of data, recommended that the level of fees for a service should sustain the cost of the service. In 1991, a fee of $1.00 per minute for access to electronic information, via a dial-up bulletin board service, was set for the district and bankruptcy courts. Four years later, the fee was reduced to $0.75 per minute, and one year after that it was reduced to $0.60 per minute. The revenue generated from these fees was used exclusively to fund the full range of Electronic Public Access services, including PACER, the Appellate Bulletin Board system, the Voice Case Information System. The Voice Case Information System provided case information free of charge. Fee revenue also provided each court with hardware and software necessary to support public access services. This included more than 700 regular telephone lines, more than 200 toll-free telephone lines, and a personal computer for free public access at the front counter of all clerks' offices with 10 or more staff.

In 1997, the Judiciary addressed three issues pertaining to providing electronic public access to court information via the Internet. These issues were: (1) the establishment of an appropriate fee for Internet access to court electronic records; (2) the types of information for which a fee should be assessed; and (3) the technical approach by which PACER information should be provided over the Internet. An application of Internet technologies to the Judiciary's public access program was viewed as a way to make court and case information more widely available and to offer the opportunity to add additional information (local rules, court forms, court calendars and hours of operation) and services.

---

[3] Judiciary Appropriations Act, 1991, Pub. L. No. 101-515,Title IV, § 404, 104 Stat. 2102 and Judiciary Appropriations Act, 1992, Pub. L. No. 102-140, Title III, § 303, 105 Stat. 782.

The Judiciary's analysis focused on finding the fairest, most easily understood, and most consistent method for charging. In 1998, the Judicial Conference adopted a per-page fee, as it was determined to be the simplest and most effective method for charging for public access via the Internet. The $0.07 per page electronic access fee[4] was calculated to produce comparable fees for large users in both the Internet and dial-up applications and thus maintain the then current public access revenue level while introducing new technologies to expand public accessibility to the PACER information. For infrequent PACER users, costs were reduced considerably by using the Internet.

In 2003, in the Congressional conference report that accompanied the Judiciary's FY 2004 appropriations act, Congress expanded the permitted uses of EPA funds to include Case Management/Electronic Case Files (CM/ECF) system costs. In order to provide sufficient revenue to fully fund currently identified CM/ECF system costs, in September 2004, the Judicial Conference approved an increase in the electronic public access fee from $0.07 to $0.08 per page, effective January 1, 2005.

Based on a recommendation from the Committee on Court Administration and Case Management, in September 2011, the Judicial Conference approved an increase in the fee from $0.08 to $0.10 per page, effective April 1, 2012, in order to give users adequate notice. The Committee noted that the fee had not been increased since 2005 and that, for the previous three fiscal years, the public access program's obligations had exceeded its revenue. The fee increase is being used to fund the Next Generation of CM/ECF and PACER. The Committee also recommended that the waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter, so that approximately 75 percent of users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal government entities for a period of three years. The Conference adopted all of the Committee's recommendations.

The Judiciary takes its responsibility to set the EPA fee very seriously. Since well before the E-Government Act, it has been the Judicial Conference's policy to set the electronic

---

[4]The per-page charge applies to the number of pages that result from any search, including a search that yields no matches (one page for no matches). In the current PACER systems, billable pages are calculated in one of two ways: a formula is used to determine the number of pages for an HTML formatted report. Any information extracted from the CM/ECF database, such as the data used to create a docket sheet, is billed using a formula based on the number of bytes extracted (4320 Bytes). For a PDF document, the actual number of pages is counted to determine the number of billable pages.

public access fee to be commensurate with the costs of providing and enhancing services related to public access. Before the one-cent-per-page increase in 2004, the Conference had a history of lowering the fee, and Congressional appropriations to the Judiciary have never provided funding for the public access program. In 2001, the Judicial Conference established a fee of $0.10 per page to print copies of documents from public access terminals in the clerks' office. That fee has never been raised. A fee is not charged to view PACER documents from the public access terminals in federal courthouses. Finally, the per page fee has been capped at the charge for 30 pages (or $3.00) for documents, docket sheets, and case-specific reports.[5]

Free Information and Exemptions

There is a high cost to providing electronic public access, and as described above, Congress decided in 1991 that the funds needed to improve electronic access to court information were to be provided by the users of this information through reasonable fees rather than by all tax payers through appropriated funds. It is also important to note, however, that the public access program does provide a great deal of federal court information to the American public for no charge. For example:

- The Judiciary does not charge for access to judicial opinions;
- Parties to a court case receive a copy of filings in the case at no charge;
- The $0.10 per page fee is not charged for viewing case information or documents on PACER at the public access terminals in the courthouses;
- If an individual account does not reach $15 quarterly, no fee is charged at all; and in a given fiscal year, approximately 65-to-75 percent of active users have fee waivers for at least one quarter. Most of these users are litigants and their attorneys who are involved in a specific case;
- Consistent with Judicial Conference policy, courts may grant exemptions for payment of electronic public access fees. Approximately 20 percent of all PACER usage is performed by users who are exempt from any charge – including indigents, case trustees, academic researchers, CJA attorneys, and *pro bono* attorneys.

[5]The 30 page fee cap does not apply to non case-specific reports such as docket activity reports that include multiple cases and reports from the PACER Case Locator.

The vast majority (95 percent) of PACER accounts incur less than $500 in fees – or no fee at all – over the course of the year. This is a long-established pattern. Additionally, the public access program also provides free access to court case information through VCIS (Voice Case Information System), an automated voice response system that provides a limited amount of bankruptcy case information directly from the court's database in response to telephone inquiries.

Benefits of a Fee

In order to maintain the level of service presently provided through the public access program, the Judiciary would need appropriated funds to replace the fee revenue, and in this fiscal climate increased appropriations are not available. Fee revenue allows the Judiciary to pursue new technologies for providing public access, develop prototype programs to test the feasibility of new public access technologies, and develop enhancements to existing systems. By authorizing the fee, Congress has provided the Judiciary with revenue that is dedicated solely to promoting and enhancing public access. These fees are only used for public access, and are not subject to being redirected for other purposes. The fee, even a nominal fee, also provides a user with a tangible, financial incentive to use the system judiciously and efficiently, and in the absence of a fee the system can be abused.

Privacy

The Judiciary is committed to protecting private information in court filings from public access. It has been over a decade since the Judicial Conference began consideration of – and subsequently formulated – a privacy policy for electronic case files, and over four years since the enactment of Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure requiring that certain personal data identifiers not be included in court filings. These policies and rules have been integral to the success of the Judiciary's electronic public access program. Adherence to these policies and rules by litigants and attorneys is essential to ensure that personal identifier information is appropriately redacted from court filings. The Judicial Conference examined how the privacy rules were working in practice and found that overall the Judiciary's implementation of the privacy rules has been a tremendous success.

In 2001, the Judicial Conference adopted a policy on privacy and public access to electronic case files that allowed Internet-based access to civil and bankruptcy case filings; the policy required filers, however, to redact certain personal information (i.e., Social Security numbers, financial account numbers, names of minor children, and dates of birth). Following a pilot program and a Federal Judicial Center study on criminal case files, the Conference approved electronic access to criminal case files, with similar redaction requirements. The redaction requirements of the Conference's privacy policy were largely incorporated into the Federal Rules, effective December 1, 2007.

As noted above, a key tenet of these rules (as well as the precursor Conference policy) is that the redaction of personal identifiers lies with the filing party. The Advisory Committee Note accompanying Federal Rule of Civil Procedure 5.2 states: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing." Nonetheless, the Judicial Conference and the Administrative Office are obviously interested in ensuring that these privacy rules are adequate and appropriately followed. To this end, two Judicial Conference Committees – the Court Administration and Case Management Committee, and the Committee on Rules of Practice & Procedure – have worked jointly with the Federal Judicial Center to monitor and study the operation of the privacy rules and related policies and to address new issues that have arisen since their implementation. In addition, the Administrative Office took a number of steps to ensure that the privacy protections established in the federal rules can be more easily followed, including the establishment of a task force that developed a notice for the current CM/ECF system reminding litigants of their obligation under the law to redact personal identifier information and to require filers to affirm that they must comply with the redaction rules.

The Administrative Office continues to encourage courts to stress the rules' redaction requirements with those who file in the court. Options for informing the filers include various, readily available communications vehicles, such as the court's public website, newsletters, listserves, and Continuing Legal Education programs. Further, Judicial Conference Committees and the Administrative Office have asked individual courts to share information on actions they have taken to ensure compliance with the privacy rules, including promulgation of local rules or standing orders, modifications to local CM/ECF applications, and outreach efforts to the public and bar informing them of the redaction requirements. This type of information will assist the Administrative Office, as well as the Conference Committees, to be better informed of the scope of any non-compliance. Thus far, the Administrative Office has received an impressive response from the courts, which are addressing the privacy rules in a variety of ways, ranging from conducting education and awareness campaigns to issuing judicial orders to redact noncompliant filings.

E-Government Act Compliance

It is important to emphasize the effort and seriousness with which the Judiciary has implemented the E-Government Act's requirements. Section 205(d) of the Act directed the Judicial Conference to "explore the feasibility of technology to post online dockets with links allowing all filings, decisions and rulings in each case to be obtained from the docket sheet of the case." The Judiciary has gone much further than "exploring" such a system. It designed and has now implemented that system in all courts, providing more than 1.4 million PACER users with access to over 500 million case file documents at a

reasonable fee – and, frequently, free of any charge at all. The EPA program was developed as an alternative to going to the courthouse during business hours and making copies at the cost of $0.50 per page. This service saves litigants/lawyers and the public time and money by allowing them to file from any computer and also to download and review case information electronically, with all the attendant benefits.

Very few state courts have electronic access systems, and none provides as much information as PACER. Many state courts charge several dollars for a single records search. No other court system in the world provides as much information to as many people in as efficient a manner. State court officials and court administrators from other countries contact the federal Judiciary frequently about our electronic public access model.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, ***Plaintiffs,*** **v.** **UNITED STATES OF AMERICA,** ***Defendant.***	**Case No. 16-745**

DECLARATION OF THOMAS LEE AND MICHAEL LISSNER

Thomas Lee and Michael Lissner hereby declare as follows:

Thomas Lee Background and Experience

1. Thomas Lee is a software developer and technologist with a background in federal government transparency issues. He currently develops software for a large venture-backed software company. In this capacity he uses cloud-based storage and computation services on a daily basis and assists in cost estimation, planning and optimization tasks concerning those services.

2. Before taking on his current private-sector role in 2014, Mr. Lee spent six years working at the Sunlight Foundation, serving four of those years as the Director of Sunlight Labs, the Foundation's technical arm. The Sunlight Foundation is a research and advocacy

organization focused on improving government transparency. Sunlight Labs' work focused on the modernization of government information technology and improving the distribution of government data. This work included technical project management, budgeting, media appearances and testimony before Congress, among other tasks.

3. Prior to joining the Sunlight Foundation, Mr. Lee built websites for large nonprofits, the U.S. Navy, and the offices of individual members and committees within the U.S. Senate and House of Representatives. Mr. Lee's resume is attached to this declaration.

Michael Lissner Background and Experience

4. Michael Lissner is the executive director of Free Law Project, a nonprofit organization established in 2013 to provide free, public, and permanent access to primary legal materials on the internet for educational, charitable, and scientific purposes to the benefit of the general public and the public interest. In this capacity he provides organizational management, publishes advocacy materials, responds to media inquiries, and writes software.

5. Since 2009, Free Law Project has hosted RECAP, a free service that makes PACER resources more widely available. After installing a web browser extension, RECAP users automatically

contribute PACER documents they purchase to a central repository. In return, when using PACER, RECAP users are notified if a document exists in the RECAP central repository. When it does, they may download it directly from the RECAP repository, avoiding the need to pay PACER fees.

6. In the course of maintaining and improving RECAP, Mr. Lissner has become extensively familiar with PACER. During this time RECAP's archive of PACER documents has grown to more than 1.8 million dockets containing more than 40 million pages of PACER documents.

7. Mr. Lissner has conducted extensive research on the operation and history of the PACER system. Among other topics, this research has focused on the costs of PACER content and the history of PACER fees. This research is available on the Free Law Project website.[1] Mr. Lissner's resume is attached to this declaration.

Expert Assignment and Materials Reviewed

8. We have been asked by the plaintiffs' counsel in this case to evaluate the reported fee revenue and costs of the PACER system in light of our knowledge of existing information technology and data-storage costs, our specific knowledge of the PACER system, and our background in federal government information systems.

[1] https://free.law/pacer-declaration/

9. Specifically, the plaintiffs' counsel have asked us to offer an opinion on whether the Administrative Office of the U.S. Courts (AO) is charging users more than the marginal cost of disseminating records through the PACER system—in other words, to use the language of the E-Government Act of 2002, the "expenses incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered."

10. In forming our opinion, we have reviewed the Plaintiffs' Statement of Undisputed Material Facts and some of the materials cited in that statement, including a spreadsheet provided to the plaintiffs' counsel in discovery (Taylor Decl., Ex. L) and the Defendant's Response to Plaintiffs' First Set of Interrogatories (Taylor Decl., Ex. M).

11. We also rely upon our accumulated experience as technologists and government transparency advocates.

Reasoning and Conclusions on Marginal Cost

12. As we explain in detail below, it is overwhelmingly likely that the PACER system, as operated by the Administrative Office of the Courts (AO), collects fees far in excess of the costs associated with providing the public access to the records it contains.

13. The following calculations are intended to convey fair but approximate estimates rather than precise costs.

14. The marginal cost of providing access to an electronic record consists of (a) the expenses associated with detecting and responding to a request for the record; (b) the bandwidth fees associated with the inbound and outbound transmissions of the request and its response; and (c) the pro rata expense associated with storing the records in a durable form between requests.

15. As a point of comparison we use the published pricing of Amazon Web Services (AWS). AWS leads the market for cloud computing services[2] and counts organizations including Netflix, Adobe Systems, and NASA among its customers. Like most cloud providers, AWS pricing accounts for complex considerations such as equipment replacement, technical labor, and facilities costs. Although the division is profitable, AWS prices are considered highly competitive. AWS services are organized into regions, each of which represents a set of data centers in close geographic and network proximity to one another.

16. For our evaluation, we first consider the cost of storage. Researcher Matthew Komorowski[3] and data storage firm BackBlaze[4] have published storage cost time series that when combined cover the period dating from the PACER system's 1998 debut to the present.

---

[2] https://www.srgresearch.com/articles/leading-cloud-providers-continue-run-away-market.
[3] http://www.mkomo.com/cost-per-gigabyte
[4] https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/

During this time their data shows the cost of a gigabyte of storage falling from $65.37 to $0.028, a reduction of over 99.9%. During this same time period PACER's per-page fees increased 43%, from $0.07 to $0.10.

17. The effect of economies of scale makes it difficult to assemble comparable time series for bandwidth and computing costs. We are therefore unable to easily compare PACER fees' growth rate to the change in bandwidth and computing costs from 1998 to the present.

18. Fortunately, it is possible to compare recent PACER fee revenue totals to reasonable contemporary costs for the technical functionality necessary to perform PACER's record retrieval function. The AWS Simple Storage Service (S3) provides this necessary data storage and retrieval functionality and publishes straightforward and transparent pricing for it. S3 costs vary by region. Using the prices published on August 27, 2017 for the "GovCloud" region, which is designed for U.S. government users, we find storage prices of $0.039 per gigabyte[5] per month for the first 50 terabytes, $0.037 per gigabyte per month for the next 450 terabytes, and $0.0296 per gigabyte per month for the next 500 terabytes. Retrieving an item from the

[5] The quantity of data contained in a terabyte/gigabyte/megabyte/kilobyte varies slightly according to which of two competing definitions is used. Our analysis employs the definitions used by Amazon Web Services. c.f. https://docs.aws.amazon.com/general/latest/gr/glos-chap.html

GovCloud region currently costs $0.004 per 10,000 requests, plus data transmission at $0.01 per gigabyte.

19. Determining how these prices might apply to PACER's needs requires knowledge of the PACER system's size. We are not aware of a current and authoritative source for this information. Instead, we employ an estimate based on two sources from 2014: that year's Year-End Report on the Federal Judiciary,[6] and an article published in the *International Journal for Court Administration*.[7] The former states that PACER "currently contains, in aggregate, more than one billion retrievable documents." The latter states that the PACER "databases contain over 47,000,000 cases and well over 600,000,000 legal documents; approximately 2,000,000 new cases and tens of millions of new documents are entered each year." Although the large difference in document counts makes it unlikely that both of these estimates are correct, they provide an order of magnitude with which to work. For the sake of our estimate we double the larger of these numbers and make the generous assumption that PACER now contains two billion documents.

20. Mr. Lissner's custodianship of the RECAP archive allows us to make estimates of the typical properties of PACER documents.

[6] https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf
[7] Brinkema, J., & Greenwood, J.M. (2015). E-Filing Case Management Services in the US Federal Courts: The Next Generation: A Case Study. International Journal for Court Administration, 7(1). Vol. 7, No. 1, 2015.

21. The RECAP Archive contains the most-requested documents from PACER, making them appropriate for our analysis.

22. Mr. Lissner finds an average document size of 254 kilobytes and 9.1 pages, and therefore an average page size of 27.9 kilobytes. Assuming a PACER database size of two billion documents and the prices recorded above, we calculate that annual storage costs of the the PACER database on S3 would incur fees totaling $226,041.60.

23. This leaves the task of estimating the costs incurred by the retrieval of documents. To do this we must estimate the total number of requests served by PACER each year. The PACER fee revenue reported for 2016 in the spreadsheet provided to the plaintiffs' counsel in discovery is $146,421,679. The per-page PACER fee in 2016 was $0.10. Simple arithmetic suggests that approximately 1,464,216,790 pages were retrieved from PACER in 2016.

24. This calculation does not reflect the 30 page/$3.00 per-document cap on fees built into PACER's price structure; nor the fact that some of the revenue comes from search results, which are also sold by the page; nor any other undisclosed discounts.

25. The RECAP dataset's 9.1 page average document length suggests that the fee cap might not represent a substantial discount to users in practice.

27. Out of an abundance of caution against underestimating costs, we account for these inaccuracies by rounding the estimated request count up to two billion for the following calculations.

28. Using aforementioned S3 prices for retrieving an item from storage, this volume of annual requests would incur $800 in fees. An additional $558.24 in bandwidth costs would also be incurred. This yields a total yearly estimate for storing and serving PACER's dataset using AWS S3's GovCloud region of $227,399.84, or 0.16% of PACER's reported 2016 fee revenue.

29. The tremendous disparity between what the judiciary actually charges in PACER fees and what is reasonably necessary to charge is illustrated by two alternative calculations. The first considers what the per page fee could be if PACER was priced according to our calculations. Including storage costs, we estimate that the per page cost of retrieving a document from PACER could cost $0.0000006 (about one half of one ten-thousandth of a penny). The second alternate calculation considers how many requests PACER could serve if the fees it currently collects were used exclusively and entirely for providing access to its records. Assuming no change in the size of the dataset and using the storage costs calculated in association with that size, $146,195,637.40 in fee revenue remains to cover document requests and bandwidth. At the previously cited rates, this would

cover the costs associated with serving 215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States.

Reasoning and Conclusions on Reasonableness of Costs

30. We offer the preceding analysis with three caveats. First, at the time of PACER's design and implementation, cloud computing services were not widely available and the cost savings associated with their scale could not be achieved. It is therefore reasonable to assume that PACER's costs could be artificially high due to the time in which it was built, although effective ongoing maintenance and modernization should attenuate this effect. Second, although the Administrative Office of the Courts could directly use the Amazon Web Services we discuss, it would not be uncommon or unreasonable to purchase those services through a reseller who increases their price by some amount. Third, it is important to note that as outside analysts with limited information, we cannot anticipate or account for all of the costs that could conceivably be associated with access to PACER records.

31. But it is noteworthy that PACER fees increased during a period of rapidly declining costs in the information technology sector. Even after taking the preceding caveats into account, we are unable to offer a reasonable explanation for how PACER's marginal cost for

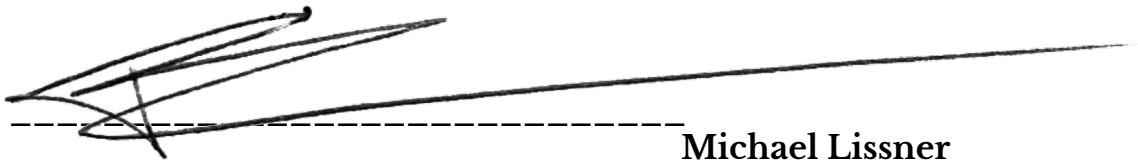
serving a record could be many orders of magnitude greater than the contemporary cost of performing this function.

32. It is overwhelmingly likely that the PACER system, as administered by the AO, collects fees far in excess of the costs associated with providing the public access to the records it contains.

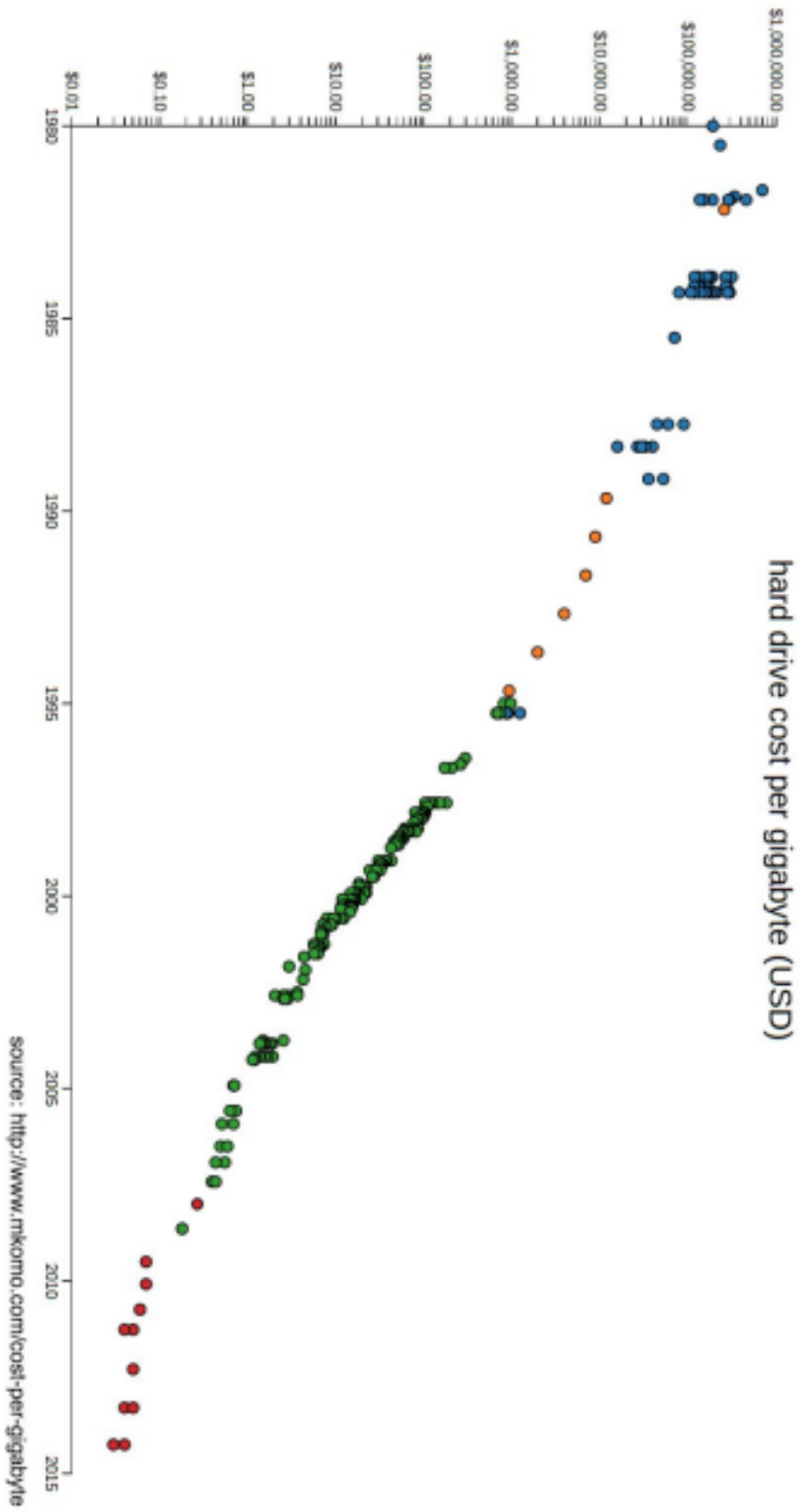
33. We declare under penalty of perjury that the foregoing is true and correct.

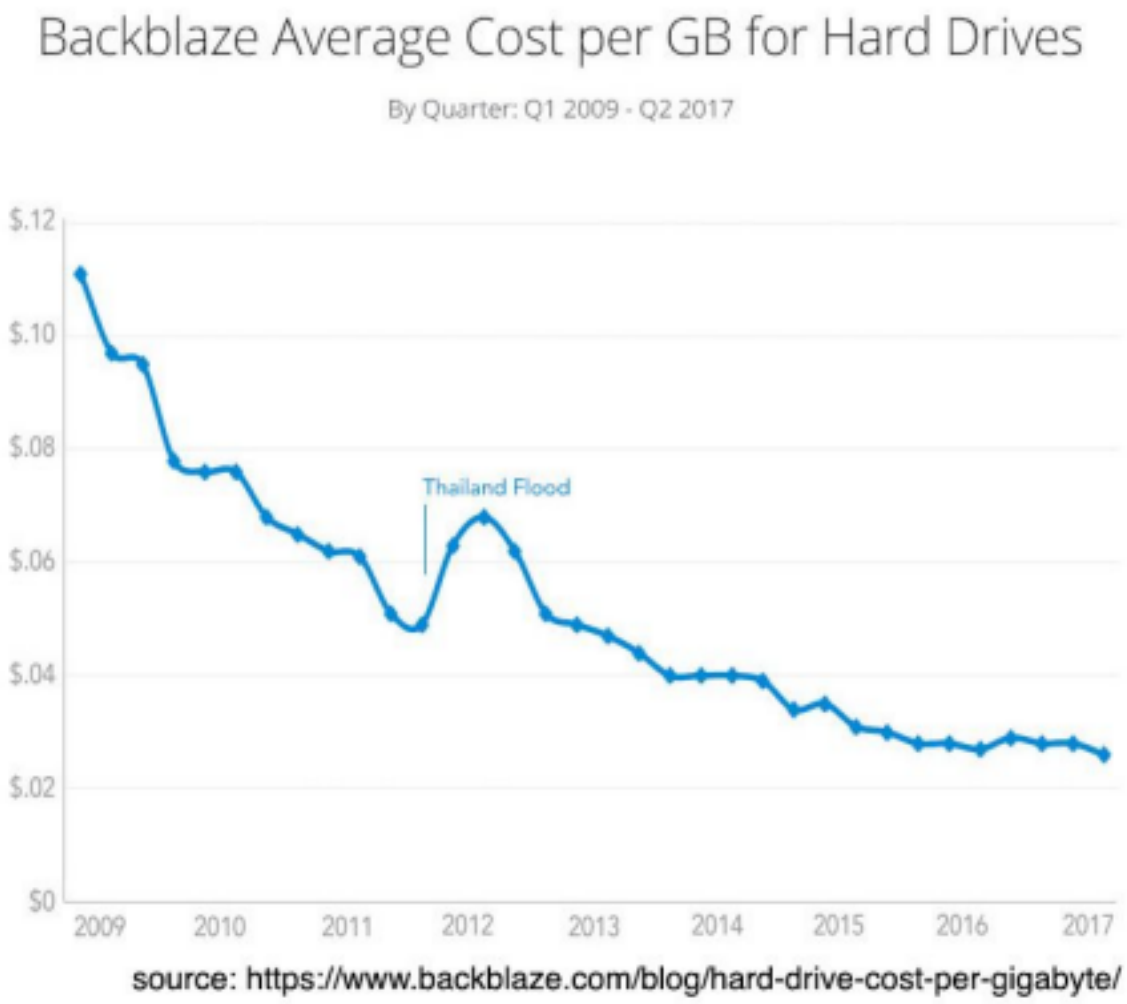
Executed on August 28, 2017.

Thomas Lee



Michael Lissner


hard drive cost per gigabyte (USD)
$0.01
$0.10
$1.00
$10.00
$100.00
$1,000.00
$10,000.00
$100,000.00
$1,000,000.00
1980
1985
1990
1995
2000
2005
2010
2015
source: http://www.mkomo.com/cost-per-gigabyte


Backblaze Average Cost per GB for Hard Drives
By Quarter: Q1 2009 - Q2 2017
$.12
$.10
$.08
$.06
$.04
$.02
$0
Thailand Flood
2009
2010
2011
2012
2013
2014
2015
2016
2017
source: https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/

Thomas Lee

understanding / making / explaining technology
https://www.linkedin.com/in/tom-lee-a2112387/

50 Q St NE #2
Washington, DC 20002
(703) 944-7654
thomas.j.lee@gmail.com
https://github.com/sbma44

EXPERIENCE

Mapbox — *Geocoding Lead*

JUNE 2010 - PRESENT

Guided Mapbox's location search team through a period of fast growth and into commercial success. Also performed a variety of legal, security and hardware tasks.

- Oversaw growth of geocoding business from 1% to 21% of revenue by line item, 39% to 71% by related-deal revenue. Shipped code, performed sales engineering, led hiring, participated in enterprise support, evaluated & managed compliance for licensed data.

- Managed federal government relations, including Congressional lobbying & testimony, agency meetings & writing op-eds on behalf of leadership. Liaised with relevant open data communities.

- Coordinated outside counsel during patent defense.

- Designed and implemented royalty tracking pipeline and mobile SDK battery test methodology. Assisted in design of mobile telemetry security systems. Authored first version of security protocols for participation in infosec events with hostile networks.

Sunlight Foundation — *CTO*

DECEMBER 2008 - JUNE 2010

Managed Sunlight Labs' twenty-two person technology department during its prime years of influence and size.

- Conceived, planned and executed mission-oriented technology projects.

- Represented Sunlight's positions on various government transparency measures in Congressional testimony, speaking engagements, writing, and media appearances.

- Expanded historically web dev-focused team to include political scientists, journalists, data analysts & mobile app developers.

- Primary author of grants and reports for bulk of Sunlight funding.

- Evaluated grant applications for potential funding. Managed relationships with peer organizations, funders and grantees.

SKILLS

writing · team management · software development · data analysis · speaking · system administration · information security · embedded systems

TECHNOLOGIES

Expert
Javascript / Node.js · Python / Django / Flask · SQL / PostgreSQL · bash / GNU · Docker · AWS / EC2 / ECS / CloudFormation / DynamoDB / ElastiCache / Kinesis / S3 · PHP / Drupal / Wordpress · AVR / Arduino · QGIS · GDAL · PostGIS · Mapbox

Productive
Perl · Ruby · HTML5 · CSS

Tourist
C · C++ · Swift/XCode · three.js

ORGANIZATIONS

OpenAddresses · FLOC · HacDC · DCist

EchoDitto — *Sr. Software Architect*

DECEMBER 2005 - DECEMBER 2008

Designed & implemented LAMP applications for campaigns and large nonprofits, primarily using the Drupal and WordPress frameworks.

- Assisted in requirement-gathering, copy editing and writing, strategy brainstorming, customer interaction and visual design.

- Developed variety of reporting mechanisms (SQL/Perl/Ruby).

- Launched, maintained and generated bulk of content for developer-focused EchoDitto Labs site.

Competitive Innovations — *Software Developer*

August 2002 - DECEMBER 2005

Created ASP.NET/Microsoft CMS-backed websites for committees and member offices in the U.S. House of Representatives; the U.S. Navy; George Washington University Law School; Miami Dade Community College; and the Corporate Executive Board.

- Interviewed, evaluated, trained and participated in the management of junior technical staff.

- Possessed security clearance as of December 2005.

SELECTED CLIPS

What Everyone Is Getting Wrong About Healthcare.gov
Wonkblog, Washington Post
http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/what-everyone-is-getting-wrong-about-healthcare-gov/

The Cost of Hashtag Revolution
The American Prospect
http://prospect.org/article/cost-hashtag-revolution

The Deleted Tweets of Politicians Find a New Home
Tell Me More (NPR)
http://www.npr.org/2012/06/06/154432624/the-deleted-tweets-of-politicians-find-a-new-home

Enhancing Accountability and Increasing Financial Transparency
U.S. Senate Committee on the Budget
https://www.budget.senate.gov/hearings/enhancing-accountability-and-increasing-financial-transparency

EDUCATION

University of Virginia — *BA, Cognitive Science*

1998-2002

Concentration in neuroscience, with work in the Levy Computational Neuroscience Lab. Computer Science minor. Echols Scholar.

MICHAEL JAY LISSNER

mike@free.law • (909) 576-4123 • 2121 Russell St., Suite B, Berkeley, CA 94705

EXPERIENCE

Executive Director and Lead Developer **2013-Present**
Free Law Project **Emeryville, CA**

Founded Free Law Project as a 501(c)(3) non-profit. My responsibilities as founder/director include identifying and pursuing grants and contracts, handling the marketing and accounting needs of the organization, and developing solutions for our stakeholders.

Free Law Project has been awarded grants or contracts from Columbia University, Georgia State University, University of Baltimore School of Law, and The John S. and James L. Knight Foundation, and has partnered with Google, Inc. and the Center for Internet and Technology Policy at Princeton University.

I am the lead developer for several of Free Law Project's biggest initiatives, including:

- The first ever full-text search interface for documents from the PACER system, containing nearly 20M records;
- The creation of the largest archive of American oral argument recordings, consisting of nearly one million minutes of recordings;
- The development of a comprehensive database of American judges;
- The curation of 4M court opinions, which are available via a powerful search interface, as bulk data, or via the first ever API for legal opinions;
- The creation of a web scraping infrastructure that has gathered more than 1M documents from court websites.

This work has enabled a number of research papers, made legal research more competitive, provided a useful resource to journalists, and helped innumerable people to engage in the legal system.

New Product Designer/Developer **2012-2013**
Recommind, Inc. **San Francisco, CA**

- Worked with the new products team to design and develop new enterprise-class products for AMLAW-50 law firms.
- Led design of new API-driven document sharing platform from initial concept to final specification, seeking stakeholder approval from upper management, sales, product management, and development teams. This process was guided by the creation of paper prototypes and low fidelity wireframe diagrams, culminating in high fidelity mock-ups and a written specification.

Solutions Developer **2010-2012**
Recommind, Inc. **San Francisco, CA**

- Designed and developed new features, products and processes for internal team of technical consultants.
- Implemented distributed search systems for top international law firms.
- Collaborated with internal and external stakeholders to gather requirements and scope work.
- Developed custom crawlers and search indexes for systems with millions of records.

Technology Intern **Summer, 2009**
Center for Democracy and Technology **San Francisco, CA**
Wrote design specification and began implementation of location privacy enhancements for the new Android operating system.

Systems Analyst and Community Researcher **2005-2008**
Community Services Bureau **Contra Costa County**

- Designed and implemented system for reporting educational outcomes and program metrics to senior management.
- Researched and wrote federally-mandated annual assessment of community needs.
- Worked with contractors to administer departmental databases and systems.
- Discovered and responsibly-disclosed security vulnerabilities in department systems, protecting tens of thousands of child and parent records.
- Tracked and reported daily enrollment of more than 2,000 children.

EDUCATION

School of Information, UC Berkeley **2008-2010**

- Masters in Information Management and Systems (MIMS), with a focus on Internet Law and Policy and a certificate in Management of Technology from Haas School of Business
- Theoretical coursework in information privacy, policy and economics, intellectual property law, and technology strategy
- Technical coursework in security, networking, programming paradigms, distributed computing, API design, and information architecture
- Taught Web Architecture summer seminar to class of twenty undergraduates including fundamentals of networking, dynamic websites, and browsers

University of California, Berkeley Extension **2005-2008**

- Unix/Linux fundamentals
- System administration programming, with focus on shell scripting and Python
- Advanced Java programming

Pitzer College, Claremont, California **2000-2004**

- Bachelor of Arts in English and World Literature with a minor in Spanish Language and Literature
- Coursework in economics, mathematics and C++ programming

PROJECTS & RESEARCH

CourtListener.com

My capstone project at UC Berkeley and now a core initiative of Free Law Project, CourtListener.com is an open-source legal research tool that provides daily awareness and raw data to users via custom email alerts, Atom feeds, podcasts, a RESTful API, and bulk data. CourtListener currently:

- Hosts the RECAP Archive, a collection of nearly 20M PACER documents;
- Has 4M Boolean-searchable opinions in its corpus;
- Has more nearly 700 days of oral argument audio;
- Has a comprehensive database of American judges;
- Receives thousands of API hits per day;
- Tracks every high court in the country, adding their opinions as they are published.

https://www.courtlistener.com | https://github.com/freelawproject/courtlistener

Seal Rookery

The Free Law Project Seal Rookery is a small project to collect and distribute all government seals in the United States. Currently, the project has more than 200 judicial seals.
https://github.com/freelawproject/seal-rookery

Selected Policy, Legal and Security Papers

- CourtListener.com: A platform for researching and staying abreast of the latest in the law
- Wikipedia.org: Jacobsen v. Katzer, Zeran v. AOL
- The Layered FTC Approach to Online Behavioral Advertising
- Technology Revolution and the Fourth Amendment
- Transparent Panacea: Why Open Email is Fraught with Problems
- Proactive Methods for Secure Design
- Breaking reCAPTCHA
- Facebook's Battle Sign: A Security Analysis

http://michaeljaylissner.com/projects-and-papers/

Additional Websites and Projects

michaeljaylissner.com | free.law | github.com/freelawproject

ADDITIONAL

Distance Travel

- **Summer, 2013-2014:** Completed south-bound thru-hike of Te Araroa Trail in New Zealand (2,000 miles). The Te Araroa Trail is considered one of the most-challenging long-distance trails in the world.
- **Summer, 2010:** Completed south-bound bike tour of California coast (1,000 miles).
- **Summer, 2005:** Completed north-bound thru-hike of Pacific Crest Trail from Mexico to Canada via Sierra and Cascade mountains (2,500 miles).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

As required by Local Rule 7(h)(1), the plaintiffs provide the following statement of material facts as to which they contend there is no genuine issue[1]:

I. Overview of PACER fees

1. The Public Access to Court Electronic Records system, commonly known as PACER, is a system that provides online access to federal judicial records and is managed by the Administrative Office of the U.S. Courts (or AO). *See* ECF No. 27 (Answer) ¶ 7.

2. The current fee "for electronic access to any case document, docket sheet, or case-specific report via PACER [is] $0.10 per page, not to exceed the fee for thirty pages." *Electronic Public Access Fee Schedule* (Taylor Decl., Ex. A); *see* Answer ¶ 7.

3. The current fee "[f]or electronic access to transcripts and non-case specific reports via PACER (such as reports obtained from the PACER Case Locator or docket activity reports) [is] $0.10 per page." Taylor Decl., Ex. A; *see* Answer ¶ 7.

[1] Much of what follows is based on documents produced by the government for purposes of this litigation. These documents set forth the amount of money collected in PACER fees since fiscal year 2010, which programs that money has been used to fund, and the government's description of the programs. Although the plaintiffs do not challenge the truthfulness of any of this information in moving for summary judgment on the issue of liability, they reserve the right to do so at a later stage. In addition, the words "judiciary" and "Administrative Office" or "AO" are used interchangeably when referring to the Judicial Branch's administrative action.

4. The current fee "[f]or electronic access to an audio file of a court hearing via PACER [is] $2.40 per audio file." Taylor Decl., Ex. A; *see* Answer ¶ 7.

5. Anyone who accesses records through PACER will incur an obligation to pay fees unless she obtains a fee waiver or incurs less than $15 in fees in a given quarter. Taylor Decl., Ex. A.

II. History of PACER fees

A. The creation of PACER

8. In 1990, Congress began requiring the judiciary to charge "reasonable fees . . . for access to information available through automatic data processing equipment," including records available through what is now known as PACER. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress provided that "[a]ll fees hereafter collected by the Judiciary . . . as a charge for services rendered shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.*

9. Later in the decade, the judiciary started planning for a new e-filing system called ECF. The staff of the AO produced a paper "to aid the deliberations of the Judicial Conference" in this endeavor. *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead* (Mar. 1997) (Taylor Decl., Ex. B). The paper discussed, among other things, how the ECF system could be funded. *Id.* at 34–36. The AO staff wrote that "there is a long-standing principle" that, when imposing user fees, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." *Id.* at 34. But, two pages later, the staff contemplated that the ECF system could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36.

10. The Judicial Conference set PACER fees at $.07 per page beginning in 1998. *See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program (Taylor Decl., Ex. C).

B. The E-Government Act of 2002

11. Four years after that, Congress enacted the E-Government Act of 2002. According to a report prepared by the Committee on Governmental Affairs, Congress found that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002) (Taylor Decl., Ex. D, at 23). With the E-Government Act, "[t]he Committee intend[ed] to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." *Id.*; *see also* ECF No. 1 (Compl.) ¶ 12; Answer ¶ 12.

12. The E-Government Act amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note).

13. The full text of 28 U.S.C. § 1913 note, as amended by the E-Government Act, is as follows:

> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

C. The AO's Response to the E-Government Act

14. The Judicial Conference did not reduce or eliminate PACER fees following the enactment of the E-Government Act. *See* Compl. ¶ 13; Answer ¶ 13.

15. To the contrary, in September 2004 the Judicial Conference increased fees to $.08 per page, effective on January 1, 2005. Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges & Clerks (Oct. 21, 2004) (Taylor Decl., Ex. E). In a letter announcing the increase to the chief judges and clerks of each federal court, the AO's Director wrote: "The fee increase will enable the judiciary to continue to fully fund the Electronic Public Access Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter." *Id.* The letter does not mention the E-Government Act. *See* Compl. ¶ 13; Answer ¶ 13.

16. By the end of 2006, the Judiciary Information Technology Fund had accumulated a surplus of $146.6 million—$32.2 million of which was from PACER fees. Admin. Office, Judiciary Information Technology Annual Report for Fiscal Year 2006, at 8, (Taylor Decl., Ex. F). According to the AO, these fees had "result[ed] from unanticipated revenue growth associated with public requests for case information." *Id.*

17. Despite the surplus, the AO still did not reduce or eliminate PACER fees, but instead began "examining expanded use of the fee revenue." *Id.* It started using the excess PACER revenue to fund "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Letter from Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durbin and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010) (Taylor Decl., Ex. G); *see* Compl. ¶ 14; Answer ¶ 14.

18. Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House of Representatives. She explained that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds." *Id.*; *see* Compl. ¶ 15; Answer ¶ 15.

19. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote a letter to the Judicial Conference "to inquire if [it] is complying" with the statute. Letter from Sen. Lieberman to Hon. Lee Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conf. of the U.S. (Feb. 27, 2009) (Taylor Decl., Ex. H). He noted that "[t]he goal of this provision, as was clearly stated in the Committee report that accompanied the Senate version of the E-Government Act, was to increase free public access to [judicial] records." *Id.* He also noted that "PACER [is] charging a higher rate" than it did when the law was passed, and that "the funds generated by these fees are still well higher than the cost of dissemination." *Id.* He asked the Judicial Conference to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." *Id.*; *see* Compl. ¶ 16; Answer ¶ 16.

20. The AO's Director replied with a letter acknowledging that the E-Government Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible,'" but taking the position that "the Judiciary [was] charging PACER fees only to the extent necessary." Letter from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009) (Taylor Decl., Ex. I). The sole support the letter offered for this view

was a sentence in a conference report accompanying the 2004 appropriations bill, which said only that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." *Id.* The letter did not provide any support (even from a committee report) for using the fees to recover non-PACER-related expenses beyond ECF. *See* Compl. ¶ 17; Answer ¶ 17.

21. The following year, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. G. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up" so that the AO can fund "initiatives that are unrelated to providing public access via PACER." *Id.* He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to recover the direct cost of distributing documents via PACER"—not other technology-related projects that "should be funded through direct appropriations." *Id.*; *see also* Compl. ¶ 18; Answer ¶ 18.

22. The AO did not lower PACER fees in response to Senator Lieberman's concerns, and instead increased them to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." Admin. Office, Electronic Public Access Program Summary 1 (2012), (Taylor Decl., Ex. J). But the AO took the position that the fees comply with the E-Government Act because they "are only used for public access, and are not subject to being redirected for other purposes." *Id.* at 10; *see* Compl. ¶ 19; Answer ¶ 19.

23. In a subsequent congressional budget summary, however, the judiciary reported that (of the money generated from "Electronic Public Access Receipts") it spent just $12.1 million on "public access services" in 2012, while spending more than $28.9 million on courtroom technology. *Part 2: FY 2014 Budget Justifications, Financial Services and General Government Appropriations for 2014, Hearings Before a Subcommittee of the House Committee on Appropriations*, 113th Cong. 538, App. 2.4 (2013) (Taylor Decl., Ex. K).

24. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees. In 2014, for example, the judiciary collected nearly $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems. Admin. Office of the U.S. Courts, *The Judiciary Fiscal Year 2016 Congressional Budget Summary*, App. 2.3 & 2.4 (Feb. 2015) (ECF No. 31-1, at 647–48).

25. When questioned during a House appropriations hearing that same year, representatives from the judiciary acknowledged that "the Judiciary's Electronic Public Access Program encompasses more than just offering real-time access to electronic records." *Financial Services and General Government Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014); *see* Compl. ¶ 21; Answer ¶ 21.

26. Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has said that PACER fees "also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat- screen monitors. . . . [There have also been] audio enhancements. . . . We spent a lot of money on audio so the people could hear what's going on. . . . This all ties together and it's funded through these [PACER] fees." Hon. William Smith, Panel Discussion on Public Electronic Access to Federal Court Records at the William

and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), https://goo.gl/5g3nzo; *see* Compl. ¶ 22; Answer ¶ 22.

III. Use of PACER fees within the class period

A. Fiscal year 2010

28. The judiciary collected $102,511,199 in PACER fees for fiscal year 2010 and carried forward $34,381,874 from the previous year. Public Access and Records Management Division, *Summary of Resources* (Taylor Decl., Ex. L).

29. The cost of the Electronic Public Access Program for fiscal year 2010 was $18,768,552. *Id.* According to the government, "[t]he EPA program provided electronic public access to court information; developed and maintained electronic public access systems in the judiciary; and, through the PACER [] Service Center, provided centralized billing. It also included funding the technical elements to the PACER program, including, but not limited to, the PACER Service Center [] technical costs, contracts, technical training, uscourts.gov website, and program office technical costs." Def.'s Resp. to Pls.' First Set of Interrogs., at 2 (Taylor Decl., Ex. M).

30. Beyond the cost of the EPA program, the AO used PACER fees to fund the following programs in fiscal year 2010:

31. ***Courtroom technology.*** The AO spent $24,731,665 from PACER fees on "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." Taylor Decl., Ex. L; Ex. M, at 5.

32. At least some of the money spent to upgrade courtroom technology, such as purchasing flat screens for jurors, is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in

providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

33. ***Violent Crime Control Act Notification.*** The AO spent $332,876 from PACER fees on a "program [that] electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 5.

34. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

35. ***State of Mississippi.*** The AO spent $120,988 from PACER fees on a "Mississippi state three year study on the feasibility of sharing the Judiciary's CM/ECF filing system at the state level." Taylor Decl., Ex. L; Ex. M, at 5. The government says that "[t]his provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." *Id.*

36. Paying the State of Mississippi is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

37. ***Electronic Bankruptcy Noticing.*** The AO spent $9,662,400 from PACER fees on a system that "produces and sends court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 3. (A "341 meeting" is a meeting of creditors and equity security holders in a bankruptcy under 11 U.S.C. § 341.)

38. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

39. ***CM/ECF.*** The AO spent $23,755,083 from PACER fees on CM/ECF (short for Case Management/Electronic Case Files), the e-filing and case-management system that "provides the ability to store case file documents in electronic format and to accept filings over the internet." Taylor Decl., Ex. L; Ex. M, at 3. There is no fee for filing a document using CM/ECF. PACER, *FAQs*, https://www.pacer.gov/psc/efaq.html#CMECF.

40. The CM/ECF costs for fiscal year 2010 consisted of the following: $3,695,078 for "Development and Implementation" of the CM/ECF system; $15,536,212 for "Operations and Maintenance" of the system; $3,211,403 to "assess[] the judiciary's long term case management and case filing requirements with a view to modernizing or replacing the CM/ECF systems" (which the government calls "CM/ECF Futures"); $144,749 for "Appellate Operational Forum," which "is an annual conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operational practices and policies related to the Appellate CM/ECF system"; $674,729 for "District Operational Forum," which is a similar conference for the "District CM/ECF system"; and $492,912 for "Bankruptcy Operational Forum," a similar conference for the "Bankruptcy CM/ECF system," Taylor Decl., Ex. L; Ex. M, at 2–3.

41. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

42. ***Telecommunications.*** The AO spent $13,847,748 from PACER fees on what it calls "DCN and Security Services." Taylor Decl., Ex. L. DCN stands for "Data Communications Network"—"a virtual private network that allows access only to those resources that are considered part of the uscourts.gov domain." Taylor Decl., Ex. M, at 33. "This DCN cost [was] split between appropriated funds and Electronic Public Access (EPA) funds," and covered the "costs associated with network circuits, routers, switches, security, optimization, and management devices along with maintenance management and certain security services to support the portion of the Judiciary's WAN network usage associated with CM/ECF." *Id.* at 4. The government also spent $10,337,076 on PACER-Net, the network that "allows courts to post court information on the internet in a secure manner" and hosts both "[t]he public side of CM/ECF as well as court websites." Taylor Decl., Ex. L; Ex. M, at 2–3.

43. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

44. ***Court Allotments.*** Finally, the AO spent $9,428,820 from PACER fees on payments to the federal courts, which consisted of the following:

- $7,605,585 for "CM/ECF Court Allotments," which the governments says were "funds provided as the CM/ECF contribution/portion of the IT Infrastructure Formula, and funds for attorney training on CM/ECF";
- $1,291,335 for "Court Allotments" to fund "public terminals, internet web servers, telephone lines, paper and toner at public printers, digital audio, McVCIS" (short for "Multi-court Voice Case Information System," which "provides bankruptcy case information" to "the public over the phone"), and "grants for the courts";

- $303,527 for "Courts/AO Exchange Program," which "fund[ed] participants in the IT area, related to the Next Gen program" ("the next iteration of CM/ECF"); and
- $228,373 for "Court Staffing Additives," which covered the costs of staffing people who "worked on projects like the development of [McVCIS]."

Taylor Decl., Ex. L; Ex. M, at 4, 30.

45. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

B. Fiscal year 2011

46. The judiciary collected $113,770,265 in PACER fees for fiscal year 2011 and carried forward $26,051,473 from the previous year. Taylor Decl., Ex. L.

47. The cost of the Electronic Public Access Program for fiscal year 2011 was $3,363,770. *Id.*

48. Beyond the cost of the EPA program, the judiciary spent $10,339,444 from PACER fees on what it calls "EPA Technology Infrastructure & applications," *id.*, which is the "[d]evelopment and implementation costs for CM/ECF," and $4,318,690 on what it calls "EPA Replication," which "cover[ed] expenses for CM/ECF servers and replication and archive services." Taylor Decl., Ex. L; Ex. M, at 5–6.

49. The AO also used PACER fees to fund the following programs in fiscal year 2011:

50. ***Courtroom technology.*** The AO spent $21,542,457 from PACER fees on "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." Taylor Decl., Ex. L; Ex. M, at 8.

51. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

52. ***Violent Crime Control Act Notification.*** The AO spent $508,903 from PACER fees on a "program [that] electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 8.

53. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

54. ***Electronic Bankruptcy Noticing.*** The AO spent $11,904,000 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 7.

55. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

56. ***CM/ECF.*** The AO spent $22,540,928 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of the following: $5,400,000 for "Development and Implementation"; $11,154,753 for "Operations and Maintenance"; $4,582,423 for "CM/ECF Futures"; $176,198 for "Appellate Operational Forum"; $705,054 for "District Operational Forum"; and $522,500 for "Bankruptcy Operational Forum." *Id.*; *see* Taylor Decl., Ex. M, at 6.

57. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

58. ***Telecommunications.*** The AO spent $23,528,273 from PACER fees on telecommunications costs. Taylor Decl., Ex. L. These costs consisted of the following: $9,806,949 for "DCN and Security Services," which covered the "[c]osts associated with the FTS 2001 and Networx contracts with the PACER-Net"; $4,147,390 for "PACER-Net & DCN," which was "split between appropriated funds and Electronic Public Access (EPA) funds," and which covered the "costs associated with network circuits, routers, switches, security, optimization, and management devices along with maintenance management and certain security services to support the portion of the Judiciary's WAN network usage associated with CM/ECF"; $9,221,324 for PACER-Net; and $352,610 for "Security Services," which covered the "costs for security services associated with the PACER-Net." Taylor Decl., Ex. L; Ex. M, at 7.

59. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

60. ***Court allotments.*** Finally, the AO spent $10,618,805 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,977,635 for "CM/ECF Court Allotments"; $769,125 for "Courts/AO Exchange Program"; $1,403,091 for "Court Allotments"; and $468,954 for "Court Staffing Additives." Taylor Decl., Ex. L; Ex. M, at 7–8.

61. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an

"expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

C. Fiscal year 2012

62. The judiciary collected $124,021,883 in PACER fees for fiscal year 2012 and carried forward $31,320,278 from the previous year. Taylor Decl., Ex. L.

63. The cost of the Electronic Public Access Program for fiscal year 2012 was $3,547,279. *Id.*

64. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund $5,389,870 in "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & applications"); and $3,151,927 in "expenses for CM/ECF servers and replication and archive services" (under the category of "EPA Replication"). Taylor Decl., Ex. L; Ex. M, at 9.

65. The AO also used PACER fees to fund the following programs in fiscal year 2012:

66. ***Courtroom Technology.*** The AO spent $28,926,236 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 11–12.

67. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

68. ***Violent Crime Control Act Notification.*** The AO spent $1,030,922 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision"—$480,666 in development costs and $550,256 in operation and maintenance costs. Taylor Decl., Ex. L; Ex. M, at 11.

69. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

70. ***Web-based Juror Services.*** The AO spent $744,801 from PACER fees to cover "[c]osts associated with E-Juror software maintenance, escrow services, and scanner support. E-Juror provides prospective jurors with electronic copies of courts documents regarding jury service. Taylor Decl., Ex. L; Ex. M, at 11.

71. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

72. ***Electronic Bankruptcy Noticing***. The AO spent $13,789,000 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 10.

73. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

74. ***CM/ECF.*** The AO spent $26,398,495 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of: $8,006,727 for "Operations and Maintenance"; $164,255 for "Appellate Operational Forum"; $817,706 for "District Operational Forum"; and $531,162 for "Bankruptcy Operational Forum." *Id.* The costs also consisted of: $5,491,798 for "testing CM/ECF"; $6,095,624 to "fund[] positions that perform duties in relation to the CM/ECF

system" (which the government labels "CM/ECF Positions"); and $5,291,223 to "assess[] the judiciary's long term case management and case filing requirements with a view to modernizing or replacing the CM/ECF systems" (which the government labels "CM/ECF Next Gen."). Taylor Decl., Ex. L; Ex. M, at 9.

75. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

76. ***Communications Infrastructure, Services and Security.*** The AO spent $26,580,994 from PACER fees on these costs, which consisted of $22,128,423 for "PACER Net DCN" and $4,452,575 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 10.

77. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

78. ***Court Allotments***. Finally, the AO spent $10,617,242 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $8,063,870 for "CM/ECF Court Allotments"; $890,405 for "Courts/AO Exchange Program"; and $1,662,967 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 10–11.

79. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

D. Fiscal year 2013

80. The judiciary collected $147,469,581 in PACER fees for fiscal year 2013 and carried forward $36,049,102 from the previous year. Taylor Decl., Ex. L.

81. The cost of the Electronic Public Access Program for fiscal year 2013 was $4,652,972. *Id.*

82. Beyond the cost of the EPA program, the AO also spent $5,139,937 from PACER fees on "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"), and $10,462,534 from PACER fees on "expenses for CM/ECF servers and replication and archive services" (under the category of "EPA Replication"). Taylor Decl., Ex. L; Ex. M, at 12.

83. The AO also used PACER fees to fund the following programs in fiscal year 2013.

84. ***Courtroom Technology.*** The AO spent $31,520,316 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 15.

85. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

86. ***Violent Crime Control Act Notification.*** The AO spent $681,672 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision"—$254,548 in development costs and $427,124 in operation and maintenance costs. Taylor Decl., Ex. L; Ex. M, at 14.

87. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d

Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

88. ***Web-based Juror Services.*** The AO spent $2,646,708 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 14.

89. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

90. ***Electronic Bankruptcy Noticing***. The AO spent $12,845,156 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 13.

91. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

92. ***CM/ECF.*** The AO spent $32,125,478 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of: $4,492,800 for testing the system; $7,272,337 for "CM/ECF Positions," $6,091,633 for "Operations and Maintenance," $13,416,708 for "CM/ECF Next Gen.," $800,000 for the "District Court Forum," and $52,000 for the "Bank[ruptcy] Court" forum. Taylor Decl., Ex. L; Ex. M, at 12–13.

93. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

94. ***Communications Infrastructure, Services and Security.*** The AO spent $27,500,711 from PACER fees on these costs, which consisted of $23,205,057 for "PACER Net DCN" and $4,295,654 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 13.

95. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

96. ***Court Allotments***. Finally, the AO spent $15,754,031 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $12,912,897 for "CM/ECF Court Allotments"; $578,941 for "Courts/AO Exchange Program"; and $2,262,193 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 14.

97. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

E. Fiscal year 2014

98. The judiciary collected $144,612,517 in PACER fees for fiscal year 2014 and carried forward $39,094,63 from the previous year. Taylor Decl., Ex. L.

99. The cost of the Electronic Public Access Program for fiscal year 2014 was $4,262,398, plus $667,341 in "[c]osts associated with managing the non-technical portion of the PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 15.

100. Beyond the cost of the EPA program, the AO also spent $6,202,122 from PACER fees on "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"), and $4,367,846 on "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure" (under the category of "EPA Replication"). *Id.*

101. The AO also used PACER fees to fund the following programs in fiscal year 2014:

102. ***Courtroom Technology.*** The AO spent $26,064,339 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 18.

103. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

104. ***Violent Crime Control Act Notification.*** The AO spent $474,673 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 18.

105. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

106. ***Web-based Juror Services.*** The AO spent $2,450,096 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 18.

107. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

108. ***Electronic Bankruptcy Noticing***. The AO spent $10,005,284 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 17.

109. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

110. ***CM/ECF.*** The AO spent $39,246,201 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $8,210,918 for "CM/ECF Positions" and $7,925,183 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 16. The costs also included: $12,938,052 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems," including "function and technical support desk services, release, distribution, installation support services, communications services, and written technical documentation material"; $6,640,397 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure"; $3,328,417 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs," which were designed to support CM/ECF by providing "on-line analytics, reports, dashboards, as well as seamless integration with other judiciary systems through web services and other application programming interfaces"; and $75,000 for the "CSO Combined Forum," which "is a conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operations practices and policies related to the CM/ECF system." *Id.*

111. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an

"expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

112. ***Communications Infrastructure, Services and Security.*** The AO spent $38,310,479 from PACER fees on these costs, which consisted of $33,022,253 for "PACER Net DCN" and $5,288,226 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 17.

113. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

114. ***Court Allotments***. Finally, the AO spent $10,754,305 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,698,248 for "CM/ECF Court Allotments"; $367,441 for "Courts/AO Exchange Program"; and $2,688,616 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 17.

115. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

F. Fiscal year 2015

116. The judiciary collected $144,911,779 in PACER fees for fiscal year 2015 and carried forward $41,876,991 from the previous year. Taylor Decl., Ex. L.

117. The cost of the Electronic Public Access Program for fiscal year 2015 was $2,575,977, plus $642,160 in "[c]osts associated with managing the non-technical portion of the

PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 18.

118. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund the following: $3,345,593 in "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"); $13,567,318 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure" (under the category of "EPA Replication"); and $1,295,509 in "costs associated with the support of the uscourts.gov website." Taylor Decl., Ex. L; Ex. M, at 18–19.

119. The AO also used PACER fees to fund the following programs in fiscal year 2015:

120. ***Courtroom Technology.*** The AO spent $27,383,325 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 22.

121. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

122. ***Violent Crime Control Act Notification.*** The AO spent $508,433 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 21.

123. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

124. ***Web-based Juror Services.*** The AO spent $1,646,738 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 21.

125. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

126. ***Electronic Bankruptcy Noticing***. The AO spent $8,090,628 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 20–21.

127. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

128. ***CM/ECF.*** The AO spent $34,193,855 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $6,622,167 for "CM/ECF Positions" and $10,169,819 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 19. The costs also consisted of: $1,727,563 for "providing curriculum design and training for legal CM/ECF and NextGen," which "include[d] the scheduling of classes to meet court staff turnover (operational and technical staff) and to provide training on new features provided by NextGen"; $2,730,585 for "JENIE Branch and Information Services Branch support of CM/ECF and CM/ECF NextGen development on the JENIE platforms," including "[e]ngineering efforts for NextGen utilizing the JENIE environment"; $3,336,570 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems"; $4,574,158 for testing the system; $3,244,352 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs";

$1,680,128 for the "CSO Combined Forum"; and $108,513 for a "CM/ECF NextGen project working group." *Id.* at 19–20.

129. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

130. ***Communications Infrastructure, Services and Security.*** The AO spent $43,414,189 from PACER fees on these costs, which consisted of $36,035,687 for "PACER Net DCN" and $7,378,502 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 21.

131. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

132. ***Court Allotments***. Finally, the AO spent $11,059,019 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,964,723 for "CM/ECF Court Allotments"; $1,343,993 for "Courts/AO Exchange Program"; and $1,064,956 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 21.

133. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

G. Fiscal year 2016

134. The judiciary collected $146,421,679 in PACER fees for fiscal year 2016 and carried forward $40,254,853 from the previous year. Taylor Decl., Ex. L.

135. The cost of the Electronic Public Access Program for fiscal year 2016 was $748,495, plus $2,443,614 in "[c]osts associated with managing the non-technical portion of the PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 22–23.

136. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund the following: $6,282,055 in "[d]evelopment and implementation costs for CM/ECF"; $10,364,682 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure"; $2,046,473 to fund "positions that perform duties in relation to the CM/ECF system"; $678,400 in "[c]osts associated with an Agile team, staffed by contractors, with the purpose of re-designing and implementing an entirely new centralized product for access to all CM/ECF case data"; $1,241,031 in "costs associated with the support of the uscourts.gov website"; and $67,605 in "Information Technology support for PACER Development Branch and PACER Services Branch Staff." *Id.*

137. The AO also used PACER fees to fund the following programs in fiscal year 2016:

138. ***Courtroom Technology.*** The AO spent $24,823,532 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 26.

139. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

140. ***Violent Crime Control Act Notification.*** The AO spent $113,500 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 26.

141. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

142. ***Web-based Juror Services.*** The AO spent $1,955,285 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 26.

143. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

144. ***Electronic Bankruptcy Noticing***. The AO spent $7,069,408 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 25.

145. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

146. ***CM/ECF.*** The AO spent $39,745,955 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $6,290,854 for "CM/ECF Positions" and $11,415,754 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 23. The costs also include: $1,786,404 for "providing curriculum design and training for legal CM/ECF and NextGen"; $3,785,177 for

"JENIE Branch and Information Services Branch support of CM/ECF and CM/ECF NextGen development on the JENIE platforms"; $2,422,404 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems"; $6,182,547 for testing the system; $3,645,631 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs"; $1,680,128 for the "CSO Combined Forum," which "is a conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operations practices and policies related to the CM/ECF system"; $134,093 for a "CM/ECF NextGen project working group"; $635,520 for "CM/ECF Implementation," which funds "new contractors" and covers travel funds for "660 trips per year to support 60 courts implementing NextGen CM/ECF"; and $1,649,068 to fund a "CM/ECF Technical Assessment" to review and analyze the "performance of the Next GEN CM/ECF system." Taylor Decl., Ex. L; Ex. M, at 23–25.

147. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

148. ***Communications Infrastructure, Services and Security.*** The AO spent $45,922,076 from PACER fees on these costs, which consisted of $36,577,995 for "PACER Net DCN" and $9,344,081 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 25.

149. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d

Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

150. ***Court Allotments***. Finally, the AO spent $7,312,023 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $6,588,999 for "CM/ECF Court Allotments"; $1,069,823 for "Courts/AO Exchange Program"; and –$346,799 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 26.

151. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

IV. The decrease in the cost of data storage

152. Researcher Matthew Komorowski and data-storage firm BackBlaze have published storage-cost-time series that when combined cover the period dating from the PACER system's 1998 debut to the present. During this time their data shows the cost of a gigabyte of storage falling from $65.37 to $0.028, a reduction of over 99.9%. During this same time period PACER's per-page fees increased 43%, from $0.07 to $0.10. Lee & Lissner Decl. ¶ 16.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
Phone: (202) 888-1741
deepak@guptawessler.com

WILLIAM H. NARWOLD
MEGHAN S.B. OLIVER

ELIZABETH SMITH
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com

Attorneys for Plaintiffs

August 28, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES, et al., *Plaintiffs*, v. UNITED STATES OF AMERICA *Defendant*.	Civil Action No. 16-745 (ESH)

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant, by and through the undersigned counsel, respectfully moves this Court to grant summary judgment in its favor as to liability in this matter. The grounds for the requested relief are set forth in the accompanying memorandum in support, the statement of material facts as to which there is no genuine dispute, and the accompanying exhibits.

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES, et al., *Plaintiffs*, v. UNITED STATES OF AMERICA *Defendant*.	Civil Action No. 16-745 (ESH)

DEFENDANT'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Plaintiffs, a class of individuals and entities charged for using Defendant's Public Access to Court Electronic Records ("PACER") system, ask this Court to grant summary judgment in their favor on liability in this matter. *See* Pls.' Mot. for Summ. J. at 1 (ECF No. 52) (hereinafter, "Pls.' Mot."). In Plaintiffs' estimation, the Defendant violated the E-Government Act of 2002 by charging PACER fees that "far exceed the cost of providing the records[.]" Pls.' Mot. 1. This contention is rooted in Plaintiffs' belief that the E-Government Act bars Defendant from charging any fee "that exceed[s] the cost of administering PACER." Pls.' Mot. 12. Not so. Indeed, Plaintiffs' understanding runs counter to the plain text of the E-Government Act, as well as Congress' repeated approval of Defendant's use of funds obtained through PACER. For these reasons, as well as the others discussed herein, this Court should deny Plaintiffs' Motion and instead grant summary judgment in Defendant's favor.

From 1991 to 2002, Congress required the Judicial Conference to prescribe reasonable fees for services that provide electronic access to court data. *See* Pub. L. No. 102-140, § 303. Through the E-Government Act of 2002, Congress eliminated this requirement. Instead, the E-Government Act authorized the Judicial Conference to charge fees for public access services, as it deemed necessary. *See* Pub. L. No. 107-347. Accordingly, there can be no real debate that Congress expressly granted the Judicial Conference authority to determine the appropriate level of fees to enhance public access beyond just the costs associated with administering PACER.

In the instant dispute, the question becomes whether the E-Government Act's elimination of the fee requirement was intended to require the Judicial Conference to set a PACER fee to cover only "the cost of administering PACER," as Plaintiffs contend, *see* Pls.' Mot. 12, or whether it was intended to grant the Judicial Conference discretion in setting fees and determining when to

charge such fees to fund its public access services and the services Congress expects will be funded from these fees.

As discussed herein the relevant statutory text and legislative history reveal that the E-Government Act was intended to provide the Judicial Conference with the discretion to determine when it would charge PACER fees and the amount of those fees, with the goal of providing certain information through the Internet and increasing free public access where possible. This is made abundantly clear by the fact that the only funding Congress created for such public access services were the fees charged for PACER access. Moreover, Congress' treatment of the funds collected and deposited into the Judiciary Automation Fund, as required by Congress both before and after the passage of the E-Government Act, only confirms further that the funds received have been properly used for more than just PACER access

BACKGROUND

PACER fees find their origin in a 1988 decision of the Judicial Conference to authorize "an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts[.]" Rep. of Proceedings of the Judicial Conference of the United States at 83 (Sept. 18, 1988) (attached to Decl. of W. Skidgel, Jr. (hereinafter, "Skidgel Decl.") as Ex. A). The Judicial Conference further authorized the Committee on Judicial Improvement "to establish access fees during the pendency of the program." *Id.* Shortly thereafter, in 1989, the Judicial Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing electronic public access to court records. *See* Rep. of Proceedings of the Judicial Conference of the United States at 19 (Mar. 14, 1989) (Skidgel Decl. Ex. B). In the Judiciary Appropriations Act of 1990, Congress did exactly that—establishing the Judiciary's right to retain revenues from fees generated through the provision of court records to the public. *See* Pub. L. No. 101-162, § 406(b). In 1990, the Judicial Conference

approved an initial rate schedule for electronic public access to court data via the PACER system. *See* Rep. of Proceedings of the Judicial Conference of the United States at 21 (Mar. 13, 1990) (Skidgel Decl. Ex. C).

In the Judicial Appropriations Act of 1991, Congress instituted a requirement that the Judicial Conference set a schedule of "reasonable fees … for access to information available through automatic data processing equipment." Pub. L. No. 101-515, § 404. In doing so, Congress determined that PACER users, rather than taxpayers generally, should fund public access initiatives. Congress further required that the Judicial Conference submit each such fee schedule to Congress at least thirty days before its effective date. *See id.* Additionally, Congress directed that all such fees collected for services rendered be deposited into the Judiciary Automation Fund ("JAF")[1] to reimburse expenses incurred in providing such services to the public. *See id.*

In the Judicial Appropriations Act of 1992, Congress expressly required that the Judicial Conference "shall hereafter prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, and 1930 of Title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment."[2] Pub. L. No. 102-140.

[1] The Judiciary Automation Fund was subsequently renamed the Judiciary Information Technology Fund. *See* 28 U.S.C. § 612.

[2] Notably, the cited portions of the United States Code do not present the limitations that Plaintiffs would seek to add to the "reasonable[ness]" of the prescribed fees; rather in those statutes, there are limitations as follows:

- Under 28 U.S.C. § 1913, fees in the Courts of Appeals must be "prescribed from time to time by the Judicial Conference of the United States … reasonable and uniform in all the circuits." 28 U.S.C. § 1913.
- Under 28 U.S.C. § 1914, establishing filing fees at specific amounts in district courts, and "such additional fees only as are prescribed by the Judicial Conference of the United States. 28 U.S.C. § 1914(a)-(b).

Similarly, the House Appropriations Committee report for the Judicial Appropriations Act of 1993 expressly stated that charging fees for public access was "desirable." H. Rep. No. 102-709. In the following years, the Judicial Conference expanded the fee schedule to cover access to public records in appellate courts and the Court of Federal Claims. *See* Rep. of Proceedings of the Judicial Conference of the United States at 44–45 (Sept. 20, 1993) (Skidgel Decl. Ex. D); Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 15, 1994) (Skidgel Decl. Ex. E). Similarly, Congress required that the public access fee schedule be expanded to cover multidistrict litigation. *See* Pub. L. No. 104-317, § 403. In 1996, the Judicial Conference also approved a reduction in the fee for electronic public access for dial-up Internet connections. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 13, 1996) (Skidgel Decl. Ex. F).

In the following years, Congress repeatedly expressed its intention that the Judicial Conference use the fees generated from electronic public access services to improve and update various public access platforms. For instance, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1997 stated:

> The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case

---

- Under 28 U.S.C. § 1926, fees and costs in the Courts of Federal Claims are limited to those "the Judicial Conference prescribes." 28 U.S.C. § 1926(b).
- Under 28 U.S.C. § 1930, specific fees are established for bankruptcy proceedings, and other fees are contemplated under title 11 if those fees are prescribed by the Judicial Conference and are "of the same kind as the Judicial Conference prescribes under section 1914(b) of [Title 28]." 28 U.S.C. § 1930(b) and (e).

> documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing.

S. Rep. No. 104-676 at 89.

The Judicial Conference's decision to charge a per-page fee for public access also pre-dates the E-Government Act. Indeed, in 1998, the Judicial Conference determined that with the introduction of Internet technology to the Judiciary's current public access program, it would include a per-page fee for access, while also introducing new technologies to expand public accessibility to information via PACER. Specifically, the Judicial Conference established a fee of $0.07 per page for access to certain court records on PACER. *See* Rep. of Proceedings of the Judicial Conference of the United States at 64–65 (Sept. 15, 1998) (Skidgel Decl. Ex. G). In 2001, the Judicial Conference provided that attorneys of record and parties in a case would receive one copy of all filed documents without charge and also that no fee will be owed until an individual account holder accrues more than $10 in a calendar year. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12–13 (Mar. 14, 2001) (Skidgel Decl. Ex. H). In 2002, the Judicial Conference established a fee cap for accessing any single document, where there will be no charge after the first thirty pages of a document. *See* Rep. of Proceedings of the Judicial Conference of the United States at 11 (Mar. 13, 2002) (Skidgel Decl. Ex. I).

In 2002, Congress passed the E-Government Act of 2002. *See* Pub. L. No. 107-347. The E-Government Act amended existing law to remove the requirement that the Judicial Conference "shall hereafter" prescribe fees for public access to, instead, provide that the Judicial Conference "may, only to the extent necessary, prescribe reasonable fees." *Id*. The E-Government Act also included several directives. For instance, it required that all federal courts have websites with certain general court information (*e.g.*, courthouse location, contact information, local rules, general orders, docket information), that all court opinions issued after April 16, 2005, be available

in text-searchable format, and that an annual report be provided to Congress identifying any court requesting a deferral from these requirements. *See id*, § 205. Thus, for the first time, Congress required the Judiciary to make information available through the Internet. Left unspecified, however, in the text of the E-Government Act was any source of funding for providing this information other than the "reasonable fees prescribed by the Judicial Conference for electronic access to information stored in automated data processing equipment." Pub. L. No. 102-140, § 303(a); Pub. L. No.107-347, § 205.

In 2003, Congress expanded the operations for which the Judicial Conference should use public access fees. Specifically, the House Appropriations Committee stated that it "expect[ed] the fee for the Electronic Public Access program to provide for Case Management Electronic Case File ('CM/ECF') system enhancement and operational costs." H. Rep. No. 108-221 at 116; see H. Rep. No. 108-401 ("the conferees adopt the House report language concerning Electronic Public Access fees."). Similarly, the Senate Appropriations Committee stated that it was "impressed and encouraged" by the "new and innovative" CM/ECF system and that it expected a report on "the savings generated by this program at the earliest date possible." S. Rep. No. 108-144 at 118.[3] In order to provide sufficient revenue to support the CM/ECF enhancements and operational costs that Congress expected (and "expect[ed]" would be funded with fees from the "Electronic Public Access program"), the Judicial Conference issued a new rate schedule, charging $0.08 per page. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12 (Sept. 21, 2004) (Skidgel Decl. Ex. J). Notably, even before the E-Government Act, Congress expressed its intention that the Judiciary will spend PACER receipts beyond just the cost of supporting PACER.

[3] The Conference Report for the Omnibus Appropriations Act of 2004 expressly "adopt[ed] the language in the House Report concerning Electronic Public Access fees." 149th Cong. Rec. H12312-01 at H12515.

In fact, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1999 provided that the Committee "supports efforts of the judiciary to make information available to the public electronically, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance the availability of public access." S. Rep. No. 105-235, at 114.

In 2007, the Administrative Office of the U.S. Courts ("AO") submitted the Judiciary's Fiscal Year ("FY") 2007 Financial Plan to both the House and Senate Appropriations Committees providing for, among other things, "expanded use of the Electronic Public Access ('EPA') revenues." Judiciary FY07 Financial Plan (Mar. 14, 2007) (Skidgel Decl. Ex. K). On May 2, 2007, the Appropriations Committees sent letters to the AO, stating that the Committees had "reviewed the information included and ha[d] no objection to the financial plan including the following proposal[ ]: … the expanded use of [EPA] Receipts." Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M) (hereinafter, "2007 Letters"). Similarly, the AO submitted its FY07 Financial Plan to both Appropriations Committees, outlining various courtroom technology installations and maintenance that would be funded through EPA revenues. Judiciary FY07 Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). These expenditures were approved through the Financial Services and General Government Appropriations Act of 2008. *See* Pub. L. No. 110-161.

In 2011, the Judicial Conference again amended the PACER fee schedule, raising the per-page cost to $0.10. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Sept. 13, 2011) (Skidgel Decl. Ex. N). In doing so, the Judicial Conference expressly noted the existing statutory and policy requirements of charging fees commensurate with the cost of providing existing services and developing enhanced services. *See id.* Notably, the Judicial

Conference recognized that it had not increased PACER access fees since 2005 and also that its EPA obligations during the past three fiscal years had exceeded revenue. *See id.*

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has satisfied its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but … must set forth specific facts showing that there is a genuine issue for trial." *Id.*

ARGUMENT

I. DEFENDANT HAS COMPLIED WITH THE E-GOVERNMENT ACT

This dispute presents two widely divergent readings of the same statutory text. As discussed below, Defendant's reading and application of this statute is supported by the statute's text, its legislative history, and Congressional actions in the years since it was passed. In contrast, Plaintiffs rely on a strained reading of the statutory text and subsequent legislative history to arrive at their desired end. Specifically, Plaintiffs contend that the E-Government Act expressly bars Defendant from charging any PACER fees beyond just those fees necessary to keep the PACER system operating.[4] And Plaintiffs further allege that the current PACER fees must be deemed

[4] In fact, notwithstanding that Congress directed public access fees to be used for the CM/ECF system, *see supra* at 6, Plaintiffs reject even the notion that PACER fees may be used for this system, *see* Pls.' Mot. 9.

excessive based on the way in which Defendant has spent the money received from these fees. Both arguments miss the mark and this Court should grant summary judgment in Defendant's favor.

A. The Text of the E-Government Act Confirms That Defendant's PACER Fees are Lawful

Plaintiffs appear to operate under the misimpression that the E-Government Act is the lone source of Defendant's authorization to charge PACER fees. Yet, Defendant's authorization to charge such fees predates the E-Government Act, with that Act merely amending the existing authorization to charge reasonable fees that Defendant deems necessary for providing PACER access and other public access services. *See* Pub. L. No. 102-140; *see also* 28 U.S.C. § 1913 note. In the E-Government Act, Congress amended Pub. L. No. 102-140, § 303 to read:

> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judicial Automation Fund pursuant to 28 U.S.C. § 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Pub. L. No. 107-347, § 205(e); 28 U.S.C. § 1913 note.

In order to understand the E-Government Act properly, it must be read in the context of the previous statutory requirements regarding PACER fees and public access services.

First, it is important to understand the fund that Congress selected as the source for depositing PACER receipts. In 1989, Congress created the JAF with "[m]oneys … available to the Director [of the Administrative Office of the United States Courts] without fiscal year limitation for the procurement … of automatic data processing equipment for the judicial branch of the United States." Pub. L. No. 101-162, § 404(b)(1). The Director was also required to provide, with the approval from the Judicial Conference, an annually updated "long range plan for meeting the automatic data processing needs of the judicial branch." *Id*.[5] The plan, along with revisions, is submitted to Congress annually. *See id*.; 28 U.S.C. § 612(b)(1). And the Director may "use amounts in the Fund to procure information technology resources for the activities funded under [28 U.S.C. § 612(a)] only in accordance with the plan[.]" 28 U.S.C. § 612(b)(2). Section 612(a) describes how money in the fund may be expended:

> Moneys in the Fund shall be available to the Director without fiscal year limitation for the *procurement* (by lease, purchase, exchange, transfer, or otherwise) *of information technology resources for program activities included in the courts of appeals, district courts, and other judicial services account of the judicial branch of the United States*. The Fund shall *also* be available for expenses, including personal services, support personnel in the courts and in the Administrative Office of the United States Courts, and other costs, *for the* effective management, coordination, operation, and *use of information technology resources purchased by the Fund*.

28 U.S.C. § 612(a) (emphasis added). As noted, this is the fund Congress selected for depositing receipts of PACER fees, which informs how Congress intended the fees received from PACER access to be spent.[6] *See* Pub. L. No. 102-140, § 303.

---

[5] With some changes in terminology (*e.g*., "meeting the automatic data processing needs of the judicial branch" became "meeting the information technology resources needs of the activities funded under subsection (a)"), the law is now codified at 28 U.S.C. § 612. *See* Pub. L. No. 108-420; Pub. L. No. 104-106, § 5602.

[6] Notably, Plaintiffs do not identify any uses of PACER funds that do not satisfy this broad range of information technology expenditures approved by Congress.

Second, it is important to understand the ways in which the E-Government Act amended existing statutory language. The plain text of Public Law 102-140, as amended by the E-Government Act, states that Defendant "may, only to the extent necessary, prescribe reasonable fees … for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. Notably, this authorization makes no mention of PACER. Rather, the fees may be charged for providing information "through automatic data processing equipment." *See id.* Further, these fees "may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." *Id.* Continuing, Congress crafted an oversight role for itself with respect to these fees: "The Judicial Conference and the Director shall transmit each schedule of fees prescribed" by the preceding provision "at least 30 days before the schedule becomes effective." *Id.* Finally, Congress directed that these fees be accounted for by being "deposited as offsetting collections to the Judiciary Automation Fund … to reimburse expenses incurred in providing these services." *Id.* Accordingly, the plain text of the E-Government Act authorizes the Judicial Conference to charge fees, as it deems necessary, for the provision of information to the public through electronic means.

"As always, in interpreting a statute," the starting point is "the text of the statute itself." *Murphy Exploration and Prod. Co. v. U.S. Dep't of Interior*, 252 F.3d 473, 480 (D.C. Cir. 2001) (citing *Carter v. United States*, 530 U.S. 255 (2000)). When interpreting a statute, courts operate under the "cardinal principle of statutory construction" to "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). A plain reading of this text confirms that the Defendant's PACER fees are lawful.

Rather than relying on "the text of the statute itself," *Murphy Exploration*, 252 F.3d at 480, Plaintiffs ask this Court to act as legislator and add words to the statute that Congress did not include. Indeed, Plaintiffs suggest that the "only permissible reading of this language is that it bars the Judicial Conference from charging more in PACER fees, in the aggregate, than the reasonable costs of administering the PACER system." Pls.' Mot. 1. But the text includes no such limitation. Rather, Plaintiffs cobble together various clauses of this statutory language to reach their desired conclusion. *See* Pls.' Mot. 1 (quoting portions of 28 U.S.C. § 1913 note). Ultimately, Plaintiffs wish Congress to have stated that "[t]he Judicial Conference may, only to the extent necessary [to fund PACER], prescribe reasonable fees" and that "all fees hereafter collected as a charge for [PACER] shall be deposited as offsetting collections to the Judiciary Automation Fund … to reimburse expenses incurred in providing [PACER.]" But that is not what Congress provided. In fact, as discussed in Part I.B below, such a reading runs directly counter to the clear Congressional intent of the E-Government Act—not to mention the fact that this reading ignores that the E-Government Act never mentions PACER in any way. *See infra* at Part I.B.[7]

In addition to the language of the E-Government Act itself, the lawfulness of Defendant's PACER fees is further confirmed by the language Congress did *not* include in the E-Government Act. Specifically, Plaintiffs suggest that the "liability question" in this matter "is straightforward" because in 2002 "Congress found that PACER fees (then set at $.07 per page) were 'higher than the marginal cost of disseminating the information.'" Pls.' Mot. 5. But the Congressional Report

[7] Notably, the brief of *amici* Reporters Committee for Freedom of the Press and Seventeen Media Organizations relies on the same misunderstanding. Specifically, *amici* suggest that the E-Government Act imposes a "limitation on fees for access to court records through PACER," notwithstanding that nothing in the E-Government Act includes such a limitation. *Amici* Br. of Reporters Committee at 2 (ECF No. 59). Accordingly, *amici*'s arguments fail for the same reasons as do Plaintiffs'.

on which Plaintiffs rely goes on to note that this fee was made "[p]ursuant to existing law." *See* S. Rep. No. 107-174 at 5. Had Congress intended the E-Government Act to change that "existing law," it would have expressly done so.

In fact, Congress made clear in the E-Government Act that it knew how to require the Judicial Conference to take action. For instance, the Act included several express requirements, including, *inter alia*, that all courts have operating websites within several years and that the websites include certain specific categories of information. *See* Pub. L. No. 107-347, § 205(a), (f). Congress further required that the courts "update[ ]" this information "regularly." *Id.* § 205(b)(1). But Congress did not include any express directives regarding the amount of fees that the Judicial Conference could charge for PACER access. And where Congress chose not to use similar language imposing requirements onto Defendant with regard to PACER, courts are not to read such requirements into the text. *See Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, where, as here, Congress affirmatively established duties on the Judiciary by clear language, *see* Pub. L. No. 107-347, § 205(a)(1)-(7) (the chief judges "shall cause to be established and maintained … a website that contains … the following [seven categories of] information"), but has not required the reduction of fees if they exceed actual costs of providing a specific service, there is a presumption that Congress omitted such a requirement knowingly, *see Russello*, 464 U.S. at 23.

In fact, Congress showed in other statutory provisions that it knew how to include exactly the type of language that Plaintiffs ask the Court to read into the E-Government Act. Specifically, Plaintiffs place great weight on the E-Government Act's "offsetting collections" language, suggesting that they are entitled to recoup "reasonable" fees paid if it turns out that the fees collected exceed the cost of providing the on-line access to documents, because the legislation at

issue provides that "the fees … collected … as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. § 612(c)(1)(A) to reimburse expenses incurred in providing these services." Pls.' Mot. 5. Plaintiffs appear to argue that this language requires that fees deposited not be used for anything other than PACER and that fees may be collected only as necessary to reimburse the cost of PACER.

This reading, however, is cast into doubt by at least two other statutory provisions. For instance, in two other portions of Public Law 102-140, Congress used similar language with no hint that the amount of the fees collected would be altered by including a requirement that receipts "shall be deposited as offsetting collections[.]" Specifically, in Section 111, Congress effected specific changes to the bankruptcy fees allowed under 28 U.S.C. § 1930(a), increasing certain fees by exact dollar amounts and calling for precise percentages of the fees collected to be "deposited as offsetting collections to the appropriation "United States Trustee System Fund[.]" Pub. L. No. 102-140, § 111. If Plaintiffs' reading of such language were correct, this statutory language would have an internal conflict. In Plaintiffs' estimation, such fees may only be charged to the extent necessary to "offset[ ]" expenses. But if that were correct, it would raise serious questions about whether bankruptcy fees may still be charged at the statutorily required rates if the receipts exceed expenses. Of course, such a reading must be rejected. *See Nat'l Ass'n of Mortg. Brokers v. Bd. of Govs. of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 168 (D.D.C. 2011) ("it is a cardinal principle of statutory construction that the statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant") (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001)).

Additionally, for a second time in the statute, Congress used the "offsetting collections" language with no suggestion that this language would affect the amount of fees collected.

Specifically, Congress increased the fees collected by the Security and Exchange Commission ("SEC"): "upon enactment of this Act, the rate of fees under [15 U.S.C. § 77f(b)] shall increase [to a certain percent] and such increase shall be deposited as an offsetting collection to this appropriation to recover costs of services of the securities registration process: Provided further, That such fees shall remain available until expended.") Again, Plaintiffs' reading of such statutory language would require that this "offsetting" language be read to require the fees to be deemed unlawful if the receipts exceed the "costs of the services." *Id.* But as that would require the SEC to reduce fees below the statutorily required level, such a reading cannot be countenanced.

Indeed, when Congress concluded that estimated fees collected by the Federal Trade Commission may exceed what an agency should be permitted to spend in a given fiscal year, it provided an explicit limitation. *See* Pub. L. No. 102-140, § 111 ("fees made available to the Federal Trade Commission shall remain available until expended, but … any fees in excess of $13,500,000 shall not be available until fiscal year 1993"). Ultimately, Congress knew how to place limits on an agency's ability to collect and expend fees with express language, none of which did it do in the E-Government Act of 2002.[8]

In sum, it is clear both from the language that Congress included (and did *not* include) in the E-Government Act that the most accurate way to read the Act is that: (1) Defendant may charge "reasonable" fees for access to information available through automatic data processing equipment (e.g., information available on-line, including through PACER access); (2) those fees may be

[8] Instead, Congress required the AO to submit a "comprehensive financial plan for the Judiciary allocating all sources of available funds including appropriations, fee collections, and carryover balances, to include a separate and detailed plan for the Judiciary Information Technology fund." Pub. L. No. 110–161. Never has Congress responded to such a plan by limiting expenditures; rather, as discussed herein, it has frequently encouraged spending in areas such as courtroom technology.

prescribed to the extent necessary; (3) Defendant may provide PACER access without fees for certain classes of users; and (4) receipts from PACER fees shall be deposited in a specific fund and accounted for as offsets for services rendered, but they should be deposited in that fund regardless of the artificial limitations proposed by Plaintiffs.

But as noted earlier, Plaintiffs would instead have this Court believe that Congress *meant* the E-Government Act to read as follows: "(a) The Judicial Conference may, only to the extent necessary [to pay for PACER], prescribe reasonable fees …[and] (b) … All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered [PACER] shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. § 612(c)(1)(A) to reimburse expenses incurred in providing these services [PACER]."

That is, of course, not what Congress included in the E-Government Act and the Court should reject Plaintiffs' attempt to have this Court act as legislator and add text to the E-Government Act.

B. The E-Government Act's Legislative History Confirms that Defendant's PACER Fees are Lawful

To the extent that there remains any doubt about what Congress meant through the portions of the E-Government Act at issue here, the legislative history supports Defendant's reading. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("where the language is subject to more than one interpretation and the meaning of Congress is not apparent from the language itself," courts may "look to the general purpose of Congress in enacting the statute and to its legislative history for helpful clues"). Notably, though, the Court "must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available." *Id.*

In the Senate Appropriations Committee Report on the E-Government Act,[9] the Committee explained that the purpose behind changing from a *requirement* to charge fees ("shall") to an *ability* to charge fees ("may") was to "*encourage* the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." S. Rep. No. 107-174, § 205(e) (emphasis added). The Senate Committee Report proceeded to discuss PACER as just *one* example of the ways in which the AO disseminates information to the public. *See id.* In so doing, this Report confirms that the statutory text at issue is not limited to PACER alone, but rather confirms that PACER is merely one component of Defendant's responsibility for disseminating information to the public.

Further, Congressional treatment of Defendant's PACER fees since the E-Government Act was passed confirms this reading. Indeed, less than a year after the E-Government Act was passed, both the House and Senate Appropriations Committees expressly directed the AO to use PACER fees to update the CM/ECF system.[10] *See* S. Rep. No. 108-144 at 118; H. Rep. No. 108-221 at 116. And several years later, the AO informed Congress that it planned to use receipts from PACER fees to fund courtroom technology and to perform infrastructure maintenance. *See* Judiciary FY07

[9] The House Appropriations Committee Report on the E-Government Act is silent as to the purpose behind the language in question. *See* H. Rep. No. 107-787.

[10] Notably, Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. the following are direct costs associated with development and maintenance of CM/ECF: Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF. Skidgel Decl. ¶ 17.

Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). In response, the Committees expressly endorsed these expenditures. *See* 2007 Letters (Skidgel Decl. Exs. L & M).[11]

Similarly, the March 25, 2010 letter from Senator Lieberman on which Plaintiffs heavily rely, *see* Pls.' Mot. 1–2, confirms Defendant's understanding of the E-Government Act. Specifically, Senator Lieberman emphasized that the goal of the Act was to change from a mandatory fee to a discretionary fee. *See* Pls.' Mot. Ex. G at 4. And in this letter itself, Senator Lieberman confirms that Defendant "asked for *and received* written consent from the Appropriations Committees to 'expand use of [EPA] receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." *Id.* (emphasis added). Statements made by Senator Lieberman years later do not change this fact.[12]

---

[11] Much has been made in this litigation about television monitors in certain federal district courtrooms, which were purchased with PACER funds. But Congress was notified about this use of PACER funds and did not respond with any objection. *See* Judiciary FY07 Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). Moreover, proving a method for jurors and the general public to see case documents in a courtroom is entirely consistent with Defendant's charge to "make [such records] available to the public." 28 U.S.C. § 1913 note.

[12] Plaintiffs also suggest that Senator Lieberman's letter "reproach[ed] the AO for continuing to charge fees 'well higher than the cost of dissemination.'" Pls.' Mot. 1; Taylor Decl. Exs. G & H. And while the Court may review the text of Senator Lieberman's letter to determine whether he, in fact, "reproach[ed]" the AO, that is largely beside the point. The statutory text confirms the Defendant's reading of the E-Government Act and Senator Lieberman's isolated statements years later do nothing to change that fact. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J. concurring) ("the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed."). Indeed, not only do "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," but "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980). Ultimately, the letter from Sen. Lieberman expressly confirms that Congress "consent[ed]" to the exact "use of [EPA] receipts to support courtroom technology" about which Plaintiffs now complain. *See* Taylor Decl. Ex. G. Any attempt to twist Senator Lieberman's words from 2010 to suggest a different legislative intent behind the E-Government Act—one that is not supported by the statute's text—should be disregarded. The same fate befalls the *amici* brief that Senator Lieberman filed in this action. *See* ECF No. 56. That brief, which attempts to offer evidence of legislative intent fifteen years after the E-Government Act's passage,

C. Defendant's Use of PACER Fees is Lawful

In addition to arguing that the E-Government Act expressly limits the permissible fees charged for PACER access, Plaintiffs go to great lengths to argue by implication that Defendant must be violating the E-Government Act because, in Plaintiffs' estimation, it is spending PACER funds on improper things. But in each instance, Plaintiffs are either relying on faulty information or fail to realize that the expenditures are being made at the behest of Congress.

As noted earlier, Plaintiffs place great weight on the televisions that were placed into various courtrooms to provide jurors and the general public with the ability to view electronic records during judicial proceedings. *See supra* n.11. Plaintiffs similarly raise questions with the use of PACER fees to "(2) send notices to creditors in bankruptcy proceedings … ; (3) send notices to law-enforcement agencies under the Violent Crime Control Act … ; (4) provide online services to jurors … ; (5) cover 'costs associated with support for the uscourts.gov website,' … ; and (6) fund a state-court study in Mississippi." Pls.' Mot. 17. Not only are Plaintiffs misguided with respect to the televisions, *see supra* n. 11, but they fail to recognize that each of these identified items have been subject to Congressional approval. For instance, it was the Report from the House Committee on Appropriations regarding the Appropriations Act of 1997, which stated that the "Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance the availability of public access," including "electronic bankruptcy noticing." H. Rep. No. 104-676 at 89. Similarly, in 1998, the Report of the Senate Committee on Appropriations expressed that the Committee "expect[ed] that available balances from public

cannot be read to supersede the clear text of the statute and actions of Congress at the time of the Act's passage.

access fees in the judiciary automation fund [would] be used to enhance availability of public access." *See* S. Rep. No 105-235 at 114. The Judiciary relied on these and similar reports to develop a system for probation and pretrial services that would electronically notify local law enforcement agencies of changes to the case history and to create a web-based juror notice system. Additionally, for the "study in Mississippi," the AO undertook a study in accordance with the Senate Committee on Appropriations' Report of July 2006, which expressed the Committee's support for the Federal Judiciary sharing its case management electronic case filing system at the State level and encouraged the Judiciary to study whether sharing such technology, including electronic billing processes, is viable. *See* S. Rep. No. 109-293 at 176. Notably, these expenditures were also approved by the Committees on Appropriations from both the House and Senate. *See* 2007 Letters (Skidgel Decl. Exs. L & M).

II. PLAINTIFFS' MISCELLANEOUS ARGUMENTS LACK MERIT

Plaintiffs also rely on a scattering of miscellaneous arguments in their challenge to the PACER fees, none of which has merit.

A. Independent Offices Authorities Act

Plaintiffs ask the Court to adopt their reading of the E-Government Act based also on an analogy to the 1982 Independent Offices Authorities Act ("IOAA"). *See* Pls.' Mot. 12 (suggesting that the IOAA is an "analogous statute"). This statute authorizes agencies to charge a user fee for "each service or thing of value provided by [the] agency," 31 U.S.C. § 9701(a), but limits the fees that may be charged to fees that are "fair" and "based on" the cost to the Government, the value of the service, public policy and "other relevant facts[,]" *id.* Plaintiffs suggest that this language, read alongside the E-Government Act, shows a "clear[ ] inten[tion] for fees to be restricted to the costs of providing the services for which they are charged … and nothing more." Pls.' Mot. 14.

Plaintiffs are misguided for several reasons. First, they suggest that "[l]ike the E-Government Act, the IOAA's goal is to make agency programs conferring benefits on recipients 'self-sustaining to the extent possible.'" Pls.' Mot. 12 (quoting 31 U.S.C. § 9701(a)). But it is worth noting that the E-Government Act does not include any similar language as to that which Congress included in IOAA regarding the goal of "self-sustain[ment]." Moreover, Plaintiffs appear to suggest that this 1982 Act operates as an across-the-board restriction on any fee that an agency charges for any service where, according to Plaintiffs, there is a *per se* bar on agencies "charging fees that exceed the costs of providing the service." Pls.' Mot. 12. Not only is that unsupported by the cases on which Plaintiffs rely, it is belied by the fact that Congress routinely sets fee levels in statutes, irrespective of the exact cost of providing the underlying service. *See supra* at 14–15 (discussing several statutorily enacted fees).

Moreover, the AO is not subject to the IOAA; but even if it were, it is not subject to the IOAA regarding the portion of the E-Government Act at issue here. If the two statutes are in conflict, the E-Government Act, coming twenty years after the IOAA, would govern, allowing more discretion in the assessments of fees that can provide the services called for in the E-Government Act. Indeed, a repeal by implication may be found when earlier and later statutes are irreconcilable. *See Gallenstein v. United States*, 975 F.2d 286, 290–91 (6th Cir.1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (Courts may infer a statutory repeal if such a construction is necessary in order that the words of the later statute shall have meaning). Here, the E-Government Act expressly required courts to establish websites with specific information, including courthouse addresses and text-searchable opinions, but included no separate funding beyond that collected as

a reasonable fee for electronic access to court records. The clear intent was to permit the free access to such information even if the funds had to come from PACER fees to cover the costs.

Although the IOAA states generally that the head of an agency may establish fees, the fees at issue here are expressly provided for in another statute, which directs that the *Judicial Conference*, not the Director, may prescribe fees. Additionally, the D.C. Circuit held in *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976), that the IOAA does not authorize an agency to vary its fees among beneficiaries. *Id.* at 1138. In contrast, the Judiciary's enabling statute, specifically allowed for varying fees among beneficiaries when it stated: "Judicial Conference shall hereafter prescribe reasonable fees …. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees." Pub. L. No. 102-140, § 303. The section on exempting persons and classes of persons, and distinguishing between classes was not changed by the E-Government Act.

Furthermore, according to the Government Accountability Office's Principles of Federal Appropriations Law, which Plaintiffs reference, *see* Pls.' Mot. 14, "[f]ees incident to litigation in the courts are also commonplace, but they implicate certain constitutional considerations and are prescribed under statutes other than the IOAA." *See* Government Accountability Office, *Principles of Federal Appropriations Law,* 2008 WL 6969303; *see also* 28 U.S.C. §§ 1911 (Supreme Court), 1913 (courts of appeals), 1914 (district courts), 1926 (Court of Federal Claims), 1930 (bankruptcy fees). Thus, notwithstanding the IOAA, these provisions permit reasonable fees to be charged to those seeking access to the courts. *See, e.g., Lumbert v. Illinois Dep't of Corrections*, 827 F.2d 257 (7th Cir. 1987).

Ultimately, Plaintiffs' reliance on the IOAA is misguided as it offers no insight into either the E-Government Act or the statutory authorization for Defendant to charge PACER fees. If

anything, the IOAA language only confirms further that Congress knows how to tether an agency's charge of fees to the costs of providing a particular service. This Court may, and indeed should, cast aside Plaintiffs reliance on the IOAA.

B. First Amendment

Notwithstanding that their Complaint does not include a claim that PACER fees somehow violate the First Amendment, Plaintiffs now suggest that the First Amendment should guide the Court's resolution of how much may be charged for electronic access to Court records. *See* Pls.' Mot. 2, 14–16. But Plaintiffs fail to identify any authority for this proposition. Indeed, Plaintiffs are misguided in their belief that PACER fees create a barrier to access, as they are able to view all electronically filed records free of charge through terminals available at the courthouse.[13] Moreover, the cases on which Plaintiffs rely are inapposite, addressing fees sought to be collected for utilizing a public forum for purposes of engaging in First Amendment protected speech or other

[13] Similarly, *amici* appear to fall into the same trap. The brief of the Reporters Committee for Freedom of the Press and Seventeen Media Organizations, for instance, bases its argument on the notion that "accuracy and fairness in the news media's reporting" is aided through "unfettered and inexpensive access to court documents." *Amici* Br. of Reporters Committee at 2 (ECF No. 59). But as noted, all such records are readily available through terminals at the courthouse and, to the extent that *amici* are suggesting that there is a First Amendment right to access court filings *electronically*, they fail to offer any support for such a proposition. *See id.* at 9–10 (citing cases discussing First Amendment right to access court documents, none of which suggests a First Amendment right to *free electronic* access). The brief of the American Association of Law Libraries similarly focuses on an "essential" need for "[p]ublic access to federal court proceedings and records[.]" *Amici* Br. of Am. Assoc. of Law Libraries, *et al*. at 2 (ECF No. 61). But *amici* similarly fail to note that court records are freely accessible at the courthouse and that provisions exist for individuals to obtain free access through fee waiver requests. Ultimately, the American Association of Law Libraries offers no legal basis for concluding that the current PACER fees violate any statutory provisions. Rather, they appear simply to be using their brief to complain about the process for obtaining fee waivers. Ultimately, this Court may reject the American Association of Law Libraries' arguments, as they provide no basis for concluding that Defendant has violated any statutory provisions relevant to PACER fees.

exercise of the free exercise clause. Plaintiff's hint that somehow the First Amendment could prohibit the charging of fees as a convenience is unsupported.

The Complaint makes no mention of the First Amendment as a basis for Plaintiffs claims, nor do the cases they cite offer any support for the suggestion that the First Amendment would support a requirement to limit fees to electronic access to Court information. Plaintiffs rely on several cases that address only the collection of fees as a prerequisite to engaging in free speech. *See, e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (permit requirements for demonstration too onerous to pass First Amendment scrutiny); *Eastern Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (invalidating permit processing fees and insurance requirements for demonstration on public property). These cases involved fees collected as a precondition to granting a permit for the plaintiffs to engage in expressive activity and have no bearing here. Likewise, *Murdock v. Penn.*, 319 U.S. 105, 113–14 (1943) (Jehovah's Witnesses door to door distribution of literature and soliciting people to purchase religious books and pamphlets) and *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) (approving flat annual registration fee of $80 for all professional fundraisers as nominal and reasonably connected to administrative costs, including enforcement, of registration system, and concluding fee did not violate First Amendment), involved limitations placed on expressive conduct and have no relevance here.[14]

[14] Similarly, Plaintiffs rely on *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (discussing rights under free exercise clause); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (appeal of conviction for taking part in a parade or procession upon a public street without a license); and *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) (approving flat annual registration fee of $80 for all professional fundraisers as nominal and reasonably connected to administrative costs, including enforcement, of registration system, and concluding fee did not violate First Amendment). Pl. Mot. at 15. Those cases also support only a right freedom of expression and have no bearing on the instant dispute.

Indeed, Plaintiffs admit that the First Amendment would not act as a bar to adoption of fees above and beyond the cost to administer PACER. Pls.' Mot. 16 ("This does not necessarily mean that a statute would actually be unconstitutional if it were to expressly allow the judiciary to recoup more than the costs of administering PACER."). Thus, the First Amendment argument posited by Plaintiffs is nothing but an admission that the Judicial Conference has the power to charge the reasonable fees for access to Court information and that what remains is whether the fees charged are in compliance with the E-Government Act. In short, the imposition of a lesser fee is not compelled by the First Amendment.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and, instead, grant summary judgment in Defendant's favor.

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

DECLARATION OF Wendell A. Skidgel Jr.

I, Wendell A. Skidgel Jr., declare as follows:

1. I have Bachelor's Degrees in Mathematics and Computer Science from Eastern Nazarene College and a Juris Doctorate with a concentration in Intellectual Property from Boston University School of Law. In addition to serving as an attorney at the Administrative Office of the United States Courts for the past eleven years, I served as the Systems Manager at a Federal Appellate Court for more than five years and served as an IT Director at a Federal Bankruptcy Court. Based on my personal experiences and knowledge gained through my official duties, I make the following declarations.

2. Exhibit A is a true and correct copy of pages 1 and 83 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 18, 1988).

3. Exhibit B is a true and correct copy of pages 1, 19 and 20 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 14, 1989).

4. Exhibit C is a true and correct copy of pages 1 and 21 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 13, 1990).

5. Exhibit D is a true and correct copy of pages 1, 44, and 45 from the Rep.

of Proceedings of the Judicial Conference of the United States (Sept. 20, 1993).

6. Exhibit E is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 15, 1994).

7. Exhibit F is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 12, 1996).

8. Exhibit G is a true and correct copy of pages 1, 64, and 65 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 15, 1998).

9. Exhibit H is a true and correct copy of pages 1, 12, and 13 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 14, 2001).

10. Exhibit I is a true and correct copy of pages 1 and 11 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 13, 2002).

11. Exhibit J is a true and correct copy of pages 1 and 12 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 21, 2004).

12. Exhibit K is a true and correct copy of pages 1 and 39-46 from the Judiciary's FY2007 Financial Plan (March 14, 2007). Based on my knowledge working at the Administrative Office of the United States Courts, before Electronic Public Access (EPA) funds are used for a new purpose or program, the proposed use is included in the Judiciary's Financial Plan which is submitted to Congress. EPA funds are not expended on the proposed use until the Judiciary receives explicit approval/consent from Congress.

13. Exhibit L is a true and correct copy of a Letter from Sens. Durbin and Brownback (May 2, 2007).

14. Exhibit M is a true and correct copy of a Letter from Rep. Serrano (May 2, 2007).

15. Exhibit N is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 13, 2011).

16. Exhibits A thru J and N were all obtained from the uscourts.gov website: www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us.

17. Software development, software maintenance, software and hardware implementation, computer operations, technical and operational training, and efforts to modernize/upgrade/replace are costs inherently associated with a robust multi-user computer systems, such as CM/ECF.

18. Telecommunication costs directly associated with a multi-user computer system include communications hardware (such as network circuits, routers, and switches) and network management devices. When a multi-user system, such as CM/ECF, is available to the public via the internet, costs associated with network security, security hardware and software, intrusion detection, and other security services are required.

19. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on November 11,2017.

/s/ Wendell A. Skidgel Jr.
Wendell A. Skidgel, Jr.

EXHIBIT A

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 1988

The Judicial Conference of the United States convened on September 14, 1988, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The Chief Justice presided and the following members of the Conference were present:

First Circuit:

Chief Judge Levin H. Campbell
Chief Judge Frank H. Freedman, District of Massachusetts

Second Circuit:

Chief Judge Wilfred Feinberg
Chief Judge John T. Curtin, Western District of New York

Third Circuit:

Chief Judge John J. Gibbons
Chief Judge William J. Nealon, Jr., Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Harrison L. Winter
Judge Frank A. Kaufman, District of Maryland

Fifth Circuit:

Chief Judge Charles Clark
Chief Judge L. T. Senter, Jr., Northern District of Mississippi

RELEASE AND SALE OF COURT DATA

The judiciary generates a large volume of data which is of considerable interest and value to the bar and litigants, to the media, to scholars and government officials, to commercial enterprises, and to the general public. The courts and the Administrative Office are frequently requested to release or sell court data to individuals and organizations outside the court family, including a growing volume of requests from credit agencies and other commercial organizations desiring bankruptcy case information for purposes of resale.

On recommendation of the Committee, the Judicial Conference authorized an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts in which the experiment can be conducted at nominal cost, and delegated to the Committee the authority to establish access fees during the pendency of the program. Although existing law requires that fees collected in the experimental phase would have to be deposited into the United States Treasury, the fees charged for automated access services could defray a significant portion of the cost of providing such services, were the Congress to credit these fees to the judiciary's appropriations account in the future.

VIDEOTAPING COURT PROCEEDINGS

Under 28 U.S.C. 753, district judges may voluntarily use a variety of methods for taking the record of court proceedings, subject to guidelines promulgated by the Judicial Conference. At the request of a court that it be allowed to experiment with videotaping as a means of taking the official record, the Judicial Conference authorized an experimental program of videotaping court proceedings. Under the two-year experiment, which would include approximately six district courts (judges), in no more than two circuits, the courts of appeals would have to agree to accept as the official record on appeal a videotape in lieu of transcript or, in the alternative, the circuit must limit the production of transcript to be accepted on appeal to a very few pages. Participating judges would continue to utilize their present court reporting techniques (court reporter, electronic sound recording, etc.) during the experimental program.

The Conference designated the chair of the Committee on Judicial Improvements to seek approval of the Director of the Federal Judicial Center for the Judicial Center to design, conduct, and evaluate the experiment.

EXHIBIT B

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 14, 1989

The Judicial Conference of the United States convened on March 14, 1989, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The Chief Justice presided and the following members of the Conference were present:

First Circuit:

Chief Judge Levin H. Campbell
Chief Judge Frank H. Freedman, District of Massachusetts

Second Circuit:

Chief Judge James L. Oakes
Judge John T. Curtin, Western District of New York

Third Circuit:

Chief Judge John J. Gibbons
Judge William J. Nealon, Jr., Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge Frank A. Kaufman, District of Maryland

Fifth Circuit:

Chief Judge Charles Clark
Chief Judge L. T. Senter, Jr., Northern District of Mississippi

circuit and the distance traveled. Henceforth, the guidelines will provide that a judge assigned to work on the court of appeals should serve for at least one regular sitting (as defined by that circuit), and a judge assigned to work on the general calendar of a district court should serve at least two weeks.

COMMITTEE ON THE INTERNATIONAL APPELLATE JUDGES CONFERENCE OF 1990

The Committee on the International Appellate Judges Conference reported on its progress in planning and raising funds for the International Appellate Judges Conference to be held in Washington, D.C., in September, 1990.

COMMITTEE ON THE JUDICIAL BRANCH

JUDICIAL PAY

The single greatest problem facing the judiciary today is obtaining adequate pay for judicial officers. Judges have suffered an enormous erosion in their purchasing power as a result of the failure of their pay to keep pace with inflation. It is becoming more and more difficult to attract and retain highly qualified people on the federal bench.

In order to obtain a partial solution to this critical problem, the Judicial Conference, by unanimous vote, agreed to recommend that Congress immediately increase judicial salaries by 30 percent, and couple these increases with periodic cost-of-living adjustments (COLAs) similar to those received by other government recipients.

COMMITTEE ON JUDICIAL ETHICS

The Committee on Judicial Ethics reported that as of January, 1989, the Committee had received 2,495 financial disclosure reports and certifications for the calendar year 1987, including 1,021 reports and certifications from judicial officers, and 1,474 reports and certifications from judicial employees.

COMMITTEE ON JUDICIAL IMPROVEMENTS

RELEASE AND SALE OF COURT DATA

A. At its September 1988 session (Conf. Rpt., p. 83), the Judicial Conference authorized an experimental program of electronic

access by the public to court information in one or more district, bankruptcy, or appellate courts, and delegated to the Committee on Judicial Improvements the authority to establish access fees during the pendency of the program. Under existing law, fees charged for such services would have to be deposited into the United States Treasury. Observing that such fees could provide significant levels of new revenues at a time when the judiciary faces severe funding shortages, the Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing public access to court records.

B. The Administrative Office and the Department of Justice have entered into an agreement whereby bankruptcy courts download docket information from the NIBS and BANCAP systems to local United States Trustee offices' computers. The agreement does not deal directly with use of this information by the Trustees.

Since it is essential that this court data be disseminated and sold by the judiciary consistent with a uniform policy to be developed under the use and sale of court data program (above), the Conference resolved that data provided by the courts in these circumstances be for the Trustees' internal use only, and may not otherwise be disseminated or sold by the Trustees. Should the Trustees fail to comply, the judiciary will discontinue providing the data or seek an appropriate level of reimbursement.

ONE-STEP QUALIFICATION AND SUMMONING OF JURORS

Title VII of the Judicial Improvements and Access to Justice Act (Public Law 100-702) authorizes the Judicial Conference to conduct a two-year experiment among up to ten districts testing the viability of a one-step qualification and summoning procedure. The Conference selected for inclusion in the experiment the Northern District of Alabama, the Districts of Arizona and the District of Columbia, the Southern District of Florida, the Northern District of Illinois, the Western District of New York, the Districts of Oregon and South Dakota, the Eastern District of Texas, and the District of Utah.

LAWBOOKS FOR BANKRUPTCY JUDGES

The Conference approved revised lists of lawbooks for bankruptcy judges, Exhibits C-1 and C-2 of Volume I, Guide to Judiciary Policies and Procedures, Chapter VIII, Part E. A concise bankruptcy

EXHIBIT C

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 13, 1990

The Judicial Conference of the United States convened on March 13, 1990, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The Chief Justice presided and the following members of the Conference were present:

First Circuit:

Chief Judge Levin H. Campbell
Chief Judge Frank H. Freedman,
District of Massachusetts

Second Circuit:

Chief Judge James L. Oakes
Chief Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge A. Leon Higginbotham
Judge William J. Nealon, Jr.,
Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge Frank A. Kaufman,
District of Maryland

COMMITTEE ON JUDICIAL IMPROVEMENTS

AUTOMATION

The Judicial Conference approved the 1990 update to the Long Range Plan for Automation in the United States Courts. The Conference declined to delegate authority to the Judicial Improvements Committee to approve the annual updates of the Plan on the Conference's behalf.

MISCELLANEOUS FEES

The Conference amended the schedules of fees to be charged in the district and bankruptcy courts to establish the following rates for electronic access to court data on the PACER system, barring congressional objection. PACER allows a law firm, or other organization or individual, to use a personal computer to access a court's computer and extract public data in the form of docket sheets, calendars, and other records.

Yearly Subscription Rate:

Commercial - $60 per court
Non-profit - $30 per court

Per Minute Charge:

Commercial - $1.00
Non-profit - $0.50

Under language included in the judiciary's appropriations act for the fiscal year 1990 (Public Law 101-162), the judiciary will be entitled to retain the fees collected for PACER services in the bankruptcy courts. The Conference agreed to seek similar legislative language to permit the judiciary to retain the fees collected for district court PACER services.

EXHIBIT D

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 20, 1993

The Judicial Conference of the United States convened in Washington, D.C., on September 20, 1993, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Stephen G. Breyer
Judge Francis J. Boyle,
District of Rhode Island

Second Circuit:

Chief Judge Jon O. Newman
Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge John F. Gerry,
District of New Jersey

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge Morey L. Sear,
Eastern District of Louisiana

Committee on Court Administration and Case Management, the Judicial Conference supported in principle the substance of section 3 of the proposed Act, but referred to the Committee on Rules of Practice and Procedure the issue of whether the matter is more appropriately within the authority of federal rules. The Rules Committee is to report on the matter to the March 1994 session of the Judicial Conference.

The Judicial Conference agreed with the recommendation of the Court Administration and Case Management Committee to support section 5(b) of the proposed Act, which would amend 28 U.S.C. § 1915(d) by adding "failure to state a claim upon which relief can be granted" as a cause for dismissal.

Section 5 of the proposed Civil Justice Reform Act of 1993 would amend the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997(e)) to direct the courts to continue any action brought by an inmate pursuant to 42 U.S.C. § 1983 for up to 180 days in order to extend the period required for exhausting administrative remedies. On recommendation of the Committee, which was concerned about the impact of this section on the manner in which many courts process these types of cases, the Conference opposed the amendment. As an alternative, the Conference offered the provisions included in the judiciary's "housekeeping bill," which would allow a case to be continued for up to 120 days rather than the 180 days contemplated by the proposed Act. Further, the housekeeping provisions would allow a judge to determine if the administrative procedures are "otherwise fair and effective," eliminating the need to wait for certification by the Attorney General.

MISCELLANEOUS FEE SCHEDULES

At its March 1990 session, the Judicial Conference approved an amendment to the miscellaneous fee schedules for district and bankruptcy courts to provide a fee for electronic access to court data (JCUS-Mar 90, p.21). The Committee on Court Administration and Case Management believed that the policy with respect to fees for similar services in the federal courts should be consistent and, accordingly, there should be a fee for electronic access to court data for the courts of appeals.

However, while the costs of implementing a billing system in the courts of appeals for the Public Access to Electronic Records System (PACER) used by the district and bankruptcy courts (or for a similar alternative public access system) would be modest, only a small number of appellate courts offer PACER, and the usage rates of the appellate PACER system are low. Some appellate courts utilize a very different electronic access system called Appellate Court Electronic Services (ACES) (formerly known as Electronic Dissemination of Opinions System (EDOS)). The Committee determined that, at this time, the costs of implementing and operating a billing and fee collection system for electronic access to the ACES/EDOS system would outweigh the benefit of the revenues to be generated.

Thus, on recommendation of the Committee, the Judicial Conference agreed to amend the miscellaneous fee schedule for appellate courts promulgated under 28 U.S.C. § 1913 to provide a fee for usage of electronic access to court data, but to limit the application of the fee to users of PACER and other similar electronic access systems, with no fee to be applied to users of ACES/EDOS at the present time. The Conference further agreed to delegate to the Director of the Administrative Office the authority to determine the appropriate date to implement the fee, to ensure that usage rates warrant the administrative expense of collecting the fee and that the appropriate software and the billing and fee collection procedures are developed prior to implementation in the appellate courts.

INTERPRETER TEST APPLICATION FEES

Since 1985, the Administrative Office, which is responsible under 28 U.S.C. § 1827 for the development and administration of interpreter certification examinations, has contracted with the University of Arizona to perform this function. Due to concerns raised about the legal validity of language in the contract permitting the contractor to collect and budget funds without clear statutory authorization, the Judicial Conference approved a recommendation by the Court Administration and Case Management Committee that legislation be sought to authorize the Administrative Office to prescribe fees for the development and administration of interpreter certification examinations and permit a contractor to collect fees and apply them as payment for services under the contract.

FILING BY FACSIMILE

After consideration of the conflicting recommendations of three of its Committees, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Court Administration and Case Management and the Automation and Technology Committees, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted. A report on the issue should be made to the September 1994 Judicial Conference.

ARBITRATION

At the request of the Committee on Court Administration and Case Management, the Judicial Conference reconsidered its March 1993 decision not to support legislation authorizing the expansion of mandatory arbitration (JCUS-MAR 93, p. 12). The Conference again declined to support the enactment of legislation that would provide authorization to all federal courts to utilize mandatory arbitration at the courts' discretion.

EXHIBIT E

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 15, 1994

The Judicial Conference of the United States convened in Washington, D.C., on March 15, 1994, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Stephen G. Breyer
Judge Francis J. Boyle,
District of Rhode Island

Second Circuit:

Chief Judge Jon O. Newman
Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge John F. Gerry,
District of New Jersey

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge Morey L. Sear,
Eastern District of Louisiana

COMPUTER INTEGRATED COURTROOM SYSTEM

Computer integrated courtroom systems allow participants in a court proceeding "real-time" access to a transcript as it is being reported, enabling them to read testimony immediately after it is given. Such systems are substantially more expensive than other transcription methods because of the increased cost of the equipment and the reporter, who must be more highly skilled. In light of today's tight budgetary climate, on recommendation of the Committee on Court Administration and Case Management, the Judicial Conference disapproved the use of computer integrated courtroom system/real-time reporting systems as a method of recording proceedings in bankruptcy courts.

MISCELLANEOUS FEE SCHEDULE FOR COURT OF FEDERAL CLAIMS

The miscellaneous fee schedules for the district, bankruptcy and appellate courts provide a fee for usage of electronic access to court data and do not exempt federal agencies from such fees (JCUS-MAR 90, p. 21; JCUS-SEP 93, pp. 44-45). On recommendation of the Committee, the Judicial Conference approved a corresponding amendment to the miscellaneous fee schedule for the Court of Federal Claims promulgated under 28 U.S.C. § 1926.

VIDEO-CONFERENCING

The Judicial Conference approved a Committee recommendation to authorize the Middle District of Louisiana to conduct, at no cost to the judiciary, a one-year pilot project for video-conferencing prisoner civil rights and habeas corpus cases. The Conference also endorsed a Committee recommendation that a sunset date of September 30, 1995, be established for all video-conferencing pilot projects.

COURT INTERPRETING BY TELEPHONE

Based upon the successful results of a pilot program on the feasibility of interpreting by telephone, the Committee recommended that the Conference approve the use of basic telephone technology as a method of providing interpreting services in short proceedings such as pretrial hearings,

EXHIBIT F

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 12, 1996

The Judicial Conference of the United States convened in Washington, D.C., on March 12, 1996, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Juan R. Torruella
Chief Judge Joseph L. Tauro,
District of Massachusetts

Second Circuit:

Chief Judge Jon O. Newman
Chief Judge Peter C. Dorsey,
District of Connecticut

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge Edward N. Cahn,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge J. Harvie Wilkinson, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge William H. Barbour,
Southern District of Mississippi

MISCELLANEOUS FEE SCHEDULES - SEARCH FEE

Although the miscellaneous fee schedules for the district and bankruptcy courts include a fee for every search of the records of the court conducted by the clerk's office, the fee schedule for the United States Court of Federal Claims (28 U.S.C. § 1926) contains no search fee. On recommendation of the Committee, the Judicial Conference approved an amendment to the miscellaneous fee schedule for the Court of Federal Claims to add a $15 search fee and to include a reference to the guidelines for the application of the search fee found in the district court miscellaneous fee schedule.

MISCELLANEOUS FEE SCHEDULES - ELECTRONIC PUBLIC ACCESS FEE

In March 1991, the Judicial Conference approved a fee for electronic access to court data for the district and bankruptcy courts (JCUS-MAR 91, p. 16), and a similar fee was approved in March and September 1994 for the appellate courts (JCUS-MAR 94, p. 16) and the United States Court of Federal Claims (JCUS-SEP 94, p. 47), respectively. This fee has been incorporated into the appropriate miscellaneous fee schedules. The fee was initially established at $1.00 per minute; it was reduced in March 1995 to 75 cents per minute to avoid an ongoing surplus (JCUS-MAR 95, pp. 13-14). At this session, the Conference approved a Committee recommendation to reduce the fee for electronic public access further, from 75 cents per minute to 60 cents per minute.

CLOSED CIRCUIT TELEVISING OF COURT PROCEEDINGS

Proposed legislation would require federal courts to order the closed circuit televising of proceedings in certain criminal cases, particularly cases that have been moved to a remote location. The legislation would authorize or require the costs of the closed circuit system to be paid from private donations. The Judicial Conference determined to take no policy position on the legislative amendments pertaining to closed circuit television. It also approved a recommendation of the Court Administration and Case Management Committee that the House and Senate Judiciary Committee leadership be informed that such legislation, if enacted, should be modified to (a) remove any prohibition relating to the expenditure of appropriated funds; and (b) make discretionary any requirement that courts order closed circuit televising of certain criminal proceedings.

EXHIBIT G

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER 15, 1998

WASHINGTON, D.C.

JUDICIAL CONFERENCE OF THE UNITED STATES
CHIEF JUSTICE WILLIAM H. REHNQUIST,
PRESIDING
LEONIDAS RALPH MECHAM, SECRETARY

MISCELLANEOUS FEE SCHEDULES

Internet Fee for Electronic Access to Court Information. The miscellaneous fee schedules for the appellate, district and bankruptcy courts, the U.S. Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation provide a fee for public access to court electronic records (PACER) (28 U.S.C. §§ 1913, 1914, 1926, 1930 and 1932). The revenue from these fees is used exclusively to fund the full range of electronic public access (EPA) services. With the introduction of Internet technology to the judiciary's current public access program, the Committee on Court Administration and Case Management recommended that a new Internet PACER fee be established to maintain the current public access revenue while introducing new technologies to expand public accessibility to PACER information. On the Committee's recommendation, the Judicial Conference approved an amendment to the miscellaneous fee schedules for the appellate, district and bankruptcy courts, the U.S. Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation to establish an Internet PACER fee of $.07 per page for public users obtaining PACER information through a federal judiciary Internet site.

The Committee also addressed the issue of what types of data or information made available for electronic public access should have an associated fee and what types of data should be provided at no cost. On recommendation of the Committee, the Judicial Conference agreed to include the following language as addenda to the same miscellaneous fee schedules:

a. The Judicial Conference has prescribed a fee for access to court data obtained electronically from the public dockets of individual case records in the court, except as provided below.

b. Courts may provide other local court information at no cost. For example:

- local rules,
- court forms,
- news items,
- court calendars,
- opinions designated by the court for publication, and

- other information—such as court hours, court location, telephone listings—determined locally to benefit the public and the court.

Court of Federal Claims. In September 1997, the Judicial Conference approved an amendment to the district court and bankruptcy court miscellaneous fee schedules to increase the fee for exemplifications to twice the amount of the fee for certifications (JCUS-SEP 97, p. 59). The miscellaneous fee schedule for the United States Court of Federal Claims also contains a provision on fees for exemplifications and certifications, which was inadvertently excluded from this Conference action. At this session, the Conference approved a Committee recommendation that the Conference amend Item 3 of the United States Court of Federal Claims miscellaneous fee schedule to make the fee for certification of any document or paper, where the certification is made directly on the document or by separate instrument, $5 [4] and the fee for exemplification of any document or paper twice the amount of the fee for certification.

The Court of Federal Claims was also omitted from action taken by the Conference in March 1993 amending the miscellaneous fee schedule for district courts to increase the fees for admission to practice and for duplicate admission certificates and certificates of good standing (JCUS-MAR 93, p. 6). Since the miscellaneous fee schedule for the Court of Federal Claims contains similar provisions, at this session the Conference approved the Committee's recommendation that the Conference raise the attorney admission fee, prescribed in Item 4 of the United States Court of Federal Claims miscellaneous fee schedule, to $50 and the fee for a duplicate certificate of admission or certificate of good standing to $15, provided that legislation permitting the judiciary to retain any increase in fees collected under the miscellaneous fee schedules is enacted.

CONSOLIDATION - SOUTHERN DISTRICT OF WEST VIRGINIA

At its March 1998 session, the Judicial Conference adopted procedures for combining functions in the district and bankruptcy courts. The procedures provide for the review of requests for the consolidation of district and bankruptcy

[4]The Judicial Conference, in September 1996, approved an inflationary increase of this fee to $7.00, provided legislation is enacted permitting the judiciary to retain the resulting increase (JCUS-SEP 96, p. 54).

EXHIBIT H

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

MARCH 14, 2001
WASHINGTON, D.C.

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

COMMITTEE ACTIVITIES

Since its last report in September 2000, the Committee on Codes of Conduct received 25 new written inquiries and issued 26 written advisory responses. During this period, the average response time for requests was 19 days. The Chairman received and responded to 23 telephonic inquiries. In addition, individual Committee members responded to 135 inquiries from their colleagues.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

MISCELLANEOUS FEE SCHEDULES

Electronic Public Access. Pursuant to 28 U.S.C. §§ 1913, 1914, 1926(a), 1930(b) and 1932, the Judicial Conference is authorized to prescribe fees to be collected by the appellate and district courts, the Court of Federal Claims, the bankruptcy courts, and the Judicial Panel on Multidistrict Litigation, respectively. While the various fees included in these miscellaneous fee schedules are often court-specific, the fees pertaining to electronic public access (EPA) to court information cut across fee schedule lines. The Judicial Conference approved a Court Administration and Case Management Committee recommendation that EPA fees be removed from the various courts' fee schedules and reissued in an independent miscellaneous EPA fee schedule that would apply to all court types.

The Committee also recommended three substantive amendments to the EPA fee schedule. The first amendment concerned the user fee for Internet access to the judiciary's new case management/electronic case files (CM/ECF) system. Pursuant to section 404 of Public Law No. 101-515, which directs the Judicial Conference to prescribe reasonable fees for public access to information available in electronic form, the judiciary established a seven cents per page fee for Internet access to electronic court records that will apply to CM/ECF when it is introduced (JCUS-SEP 98, p. 64). In response to

concerns about the effect of these fees on open access to court records, especially with regard to litigants, the Committee recommended that the schedule be amended to state that attorneys of record and parties in a case (including pro se litigants) receive one free electronic copy of all filed documents, if receipt is required by law or directed by the filer, which could then be printed and saved to the recipient's own computer or network. The Committee further recommended that no fee under this provision be owed until an individual account holder accrued charges of more than $10 in a calendar year. This would allow free access to over 140 electronic pages, providing a basic level of public access consistent with the services historically provided by the courts. After discussion, the Conference adopted the Committee's recommendations.

The Committee's second proposal was for the establishment of a new fee of 10 cents per page for printing paper copies of documents through public access terminals at clerks' offices. This proposed fee, set at a level commensurate with the costs of providing existing services and developing enhanced services, is less than the 50 cents per page fee currently being charged for retrieving and copying court records and would therefore encourage the use of public access terminals and reduce demands on clerks' offices. The Conference approved the Committee's recommendation.

Lastly, the Committee recommended, and the Conference approved, the establishment of a Public Access to Court Electronic Records (PACER) Service Center search fee of $20. The PACER Service Center provides registration, billing, and technical support for the judiciary's EPA systems and receives numerous requests daily for particular docket sheets from individuals who do not have PACER accounts. This fee would be consistent with the fees currently imposed "for every search of the records of the court, and for certifying the results thereof" in the other fee schedules.

Reproduction of Recordings. The miscellaneous fee schedules for the appellate, district, and bankruptcy courts include a provision requiring that a fee be charged for "reproduction of magnetic tape recordings, either cassette or reel-to-reel...including the cost of materials." The Committee recommended that this fee be modified to account for the expanded variety of media technologies, including the use of digital equipment, rather than magnetic tape recordings. In addition, the Committee recommended that the current exemption from the fee for the federal government be eliminated when the requested record is available through the judiciary's CM/ECF system. Approving the Committee's recommendations, the Conference amended

EXHIBIT I

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

MARCH 13, 2002
WASHINGTON, D.C.

accommodate a recent high-profile case filed in the Eastern District of Virginia (*see supra*, "Privacy and Public Access to Electronic Case Files," pp. 5-6). At this session, the Conference approved the Committee's recommendation to allow such exceptions on a permanent basis.

JURY WHEEL DATA

To ensure that juries are selected randomly from a fair cross section of the community, the Administrative Office provides Census Bureau data for every jury division in each federal district showing racial, ethnic and gender composition of the general voting-age population to serve as a basis for comparison to jury wheel samplings. However, two recent court rulings have found that because an individual must be a citizen to be eligible to serve as a juror, the relevant population with which to make these comparisons is the voting-age population of *citizens*, rather than the voting-age population of *all persons*. Finding that the voting-age citizen population would provide a more precise basis for comparison against jury wheel samplings, the Committee recommended, and the Conference approved, the use of such data in lieu of voting-age general population data for district courts to complete Part IV of the Form JS-12, "Report on the Operation of the Jury Selection Plan." The Conference directed the Administrative Office to make any necessary amendments to the form to comport with this change.

ELECTRONIC PUBLIC ACCESS FEE SCHEDULE

The Electronic Public Access Fee Schedule imposes a fee of seven cents per page for case file data obtained via the Internet (JCUS-SEP 98, p. 64; JCUS-MAR 01, pp. 12-13). This fee is based upon the total number of pages in a document, even if only one page is viewed, because the case management/electronic case files system (CM/ECF) software cannot accommodate a request for a specific range of pages from a document. Concerns have been raised that this can result in a relatively high charge for a small usage. Balancing user concerns with the need to generate sufficient revenue to fund the program, the Committee recommended that the Judicial Conference amend Section I of the Electronic Public Access Fee Schedule to cap the charge for accessing any single document via the Internet at the fee for 30 pages. The Conference adopted the Committee's recommendation.

EXHIBIT J

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER 21, 2004
WASHINGTON, D.C.

JUDICIAL CONFERENCE OF THE UNITED STATES
CHIEF JUSTICE WILLIAM H. REHNQUIST,
PRESIDING
LEONIDAS RALPH MECHAM, SECRETARY

Appellate Attorney Admission Fee. The Conference adopted a recommendation of the Committee to establish an appellate attorney admission fee of $150 to be incorporated into the Court of Appeals Miscellaneous Fee Schedule. This fee is in addition to any attorney admission fee charged and retained locally pursuant to Federal Rule of Appellate Procedure 46(a)(3). The proceeds from the new fee will be deposited into the judiciary's fee account.

Central Violations Bureau (CVB) Processing Fee. The Central Violations Bureau processes the payments of approximately 400,000 petty offense citations every year that are issued by various government agencies for violations on federal property. No fee has been charged for the considerable work the CVB does in processing these cases. On recommendation of the Committee, the Judicial Conference agreed to seek legislation establishing a processing fee of $25 for cases processed through the CVB and allowing the proceeds to be retained by the judiciary.[4]

Public Access to Court Electronic Records (PACER) Internet Fee. Congress has specified that electronic public access (EPA) fees be used to enhance electronic public access, which is currently available through the PACER program. More recently, in the congressional conference report accompanying the judiciary's FY 2004 appropriations act, Congress expanded the permitted uses of EPA funds to include case management/electronic case files (CM/ECF) system operational costs. In order to provide sufficient revenue to fully fund currently identified case management/electronic case files system costs, the Conference adopted a recommendation of the Committee to amend Item 1 of the Electronic Public Access Fee Schedule to increase the fee for public users obtaining information through a federal judiciary Internet site from seven to eight cents per page.

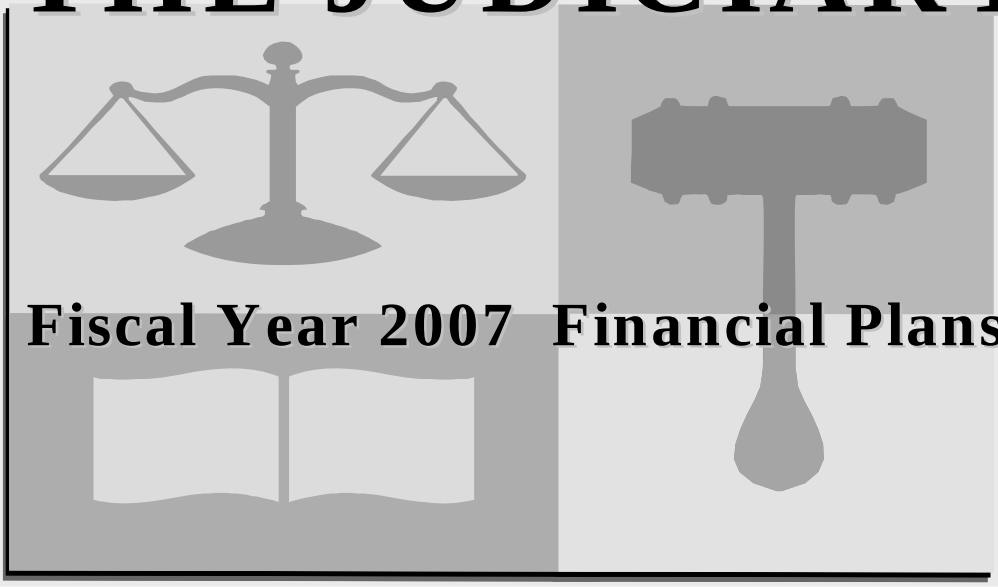
SHARING ADMINISTRATIVE SERVICES

An independent study is currently being conducted on ways to deliver administrative services to the courts in a more efficient and cost-effective manner. In order to help contain costs in the short-term while the study is being completed, the Committee on Court Administration and Case Management recommended that the Judicial Conference strongly urge all

[4]The Consolidated Appropriations Act of 2005 also provided the Judicial Conference with the authority to prescribe and retain a fee for the processing of violations through the CVB.

EXHIBIT K

THE JUDICIARY



Fiscal Year 2007 Financial Plans

MARCH 14, 2007

Fiscal Year 2007 Financial Plan
JUDICIARY INFORMATION TECHNOLOGY FUND

The Judiciary Information Technology Fund (JITF) was established by Congress in fiscal year 1990 (28 U.S.C. § 612) to assist the Judiciary in implementing its automation initiatives. The authority of the JITF was extended indefinitely in the fiscal year 1998 Commerce, Justice, State, Judiciary, and Related Agencies Appropriations Act (P.L. 105-119). The JITF was authorized "without fiscal year limitation," which allows the Judiciary to carry forward funds for projects that incur obligations over multiple years. The fund makes it possible to implement the *Long-Range Plan for Information Technology in the Federal Judiciary* and to manage the information technology (IT) program over a multi-year planning cycle while maximizing efficiencies and benefits.

The JITF provides the judiciary with a funds management tool which allows more effective and efficient planning, budgeting, and use of appropriated funds for IT activities. In keeping with the judiciary's IT mission, these activities include the design, development, acquisition, implementation, and maintenance of systems for the collection, management, manipulation, dissemination, and protection of information used by the judiciary, the bar, and the public. All IT expenses for the appellate, district, and bankruptcy courts, as well as for the probation and pretrial services offices, must be made from the fund.

Each fiscal year, current year requirements are financed via the JITF from a variety of sources:

- deposits from the courts' Salaries and Expenses account;
- fee collections from the Electronic Public Access program;
- unobligated balances in the fund resulting from prior year financial plan savings (unencumbered);
- proceeds from the sale of excess equipment;
- court allotments for non-IT purposes that are reprogrammed locally by the courts for IT initiatives under the budget decentralization program; and
- voluntary deposits from non-mandatory judiciary users of the fund (such as the Court of International Trade, the U.S. Sentencing Commission, and the Administrative Office).

The following table displays JITF requirements and funding sources for fiscal years 2006 and 2007.

Obligations ($000s)	Fiscal Year 2006 Financial Plan	Fiscal Year 2006 Actuals	Fiscal Year 2007 Financial Plan	Percent Change Plan to Plan
Salaries and Expenses	$ 288,267		$ 289,275	0.4%
Encumbered Carryforward (slippage)	$ 61,020		$ 53,759	-11.9%
Subtotal, Salaries and Expenses	$ 349,287	$ 289,653	$ 343,034	-1.8%
Electronic Public Access Program	$ 20,153	$ 11,560	$ 27,229	35.1%
Court of International Trade	$ 313	$ 148	$ 357	14.1%
U. S. Sentencing Commission	$ 1,901	$ 0	$ 1,901	0.0%
Administrative Office of the U. S. Courts	$ 727	$ 727	$ 726	-0.1%
Total Obligations:	**$ 372,381**	**$ 302,088**	**$ 373,247**	**0.2%**

The following section outlines JITF programs funded from each of the judiciary accounts.

SALARIES AND EXPENSES

The Salaries and Expenses financial plan includes available funding of $298.3 million for the fiscal year 2007 plan as detailed below.

Sources of Funding ($000)	FY 2006 Financial Plan	FY 2007 Financial Plan	Percent Change
Deposit from the Salaries and Expenses Account	$ 251,460	$ 223,693	-11.0%
Fiscal year 2006 balances (savings)	$ 0	$ 24,210	
Utilization of EPA Receipts	$ 36,807	$ 41,372	12.4%
Subtotal Current Year Obligations	**$ 288,267**	**$ 289,275**	**3.0%**

Note: Encumbered project slippage is shown separately on page 44.

Current Year Spending ($000)	FY 2006 Financial Plan	FY 2007 Financial Plan	Percent Change
Court Allotments	$ 80,154	$ 88,900	10.9%
IT Infrastructure and Project Development	$ 120,833	$ 118,641	-1.8%
Courtroom Technologies	$ 13,561	$ 17,808	31.3%
Telecommunications	$ 47,563	$ 38,628	-18.8%
Automation Support Personnel	$ 26,156	$ 25,298	-3.3%
Subtotal, Final Plan (excluding slippage)	**$ 288,267**	**$ 289,275**	**0.3%**

The content of each program activity included in the Salaries and Expenses plan is outlined below:

1) Court Allotments: $88,900,000

This category provides for the non-salary information technology formula allotments to fund court information technology and data communications/local area network equipment and infrastructure, including the cyclical replacement of this equipment, and other information technology operating expenses and telecommunication needs.

The information technology infrastructure formula is updated regularly to reflect changing IT needs of the courts. Considerations for the refreshed formula include how, when, and where technology is being used by the courts as well as updated information on life-cycle replacement periods for desktop/laptop personal computers and peripheral equipment, and emerging technologies that may benefit the courts. The refined and additional elements contained in the formula are not new requirements; rather, they reflect the courts' current IT infrastructure needs.

SALARIES AND EXPENSES continued

2) <u>IT Infrastructure and Project Development</u>: $118,641,000

This funding supports seven separate and distinct IT program components. The Judicial Conference's Information Technology Committee has endorsed using these program components to provide a better overview of the cost drivers in the JITF program. These requirements support the judiciary's IT systems and infrastructure, and provide judges and staff with the tools they need to perform their day-to-day work.

IT Infrastructure and Project Development by Program Component			
IT Program Component	**FY 2006 Financial Plan**	**FY 2007 Financial Plan**	**Percent Change**
Court Administration and Case Management	$ 20,753	$ 14,778	-28.8%
Judicial Statistical and Reporting Systems	$ 3,183	$ 2,131	-33.1%
Probation/Pretrial Services Management Systems	$ 9,094	$ 12,285	35.1%
Financial Systems	$ 14,955	$ 14,706	-1.7%
Human Resources Systems	$ 9,778	$ 15,622	59.8%
Management Information Systems	$ 10,084	$ 9,509	-5.7%
Infrastructure and Collaboration Tools	$ 52,986	$ 49,610	-6.4%
Subtotal	**$120,833**	**$ 118,641**	**-1.8%**

Court Administration and Case Management Systems**: **$14.8 million
This category encompasses systems that manage cases and case files for appellate, district and bankruptcy courts and the Central Violations Bureau. Other systems also include juror qualification, management, and payment; the management and administration of library functions (e.g., acquisitions, cataloging, serial control); and the operations and maintenance for the Central Violations Bureau which provides case management and financial information for petty offense and misdemeanor cases initiated by violation notices.

Via this financial plan submission, the Judiciary seeks spending authority to implement a Memorandum of Agreement with the State of Mississippi to undertake a three-year study of the feasibility of sharing the Judiciary's case management electronic case filing system at the state level, to include electronic billing processes. The estimated cost of this three year pilot will not exceed $1.4 million.

Judicial Statistical and Reporting Systems*: *$2.1 million
This category includes systems to support the operations and maintenance and ongoing systems development for gathering and reporting statistics in the Judiciary; financial disclosures by judges and Judiciary employees (for completing financial reports required by the Ethics in Government Act of 1978); inter-circuit assignments for courts of appeals and district courts; bankruptcy administrator management and reporting to manage cases, oversee the trustees' activity, and provide reports to federal judges; the law clerk hiring process; and electronic document capabilities for the federal rule-making process.

SALARIES AND EXPENSES continued:

Probation/Pretrial Services Management Systems: $12.3 million
This program provides probation and pretrial services personnel case management and decision support tools as well as tools to access critical case information while working in the field. Support is also provided for storage and sharing of electronic documents, collection, analysis, and reporting of client data, and the IT needs of the Federal Law Enforcement Training Center.

Financial Systems*: *$14.7 million
In addition to the financial accounting system, this program includes systems to support the local court budgeting process, make payments for private counsel and expert services, track and monitor criminal debt imposed by the court, handle cash receipting, report court payroll information, and handle travel expenses.

Human Resources Systems: $15.6 million
This program encompasses systems for personnel, payroll, and retirement related services, judges' retirement, fair employment practices reporting, and integration of all human resources-related items as well as efforts to reduce travel-based training. It also includes equipment to produce educational news programming for the Judiciary, the public, and Congress. The cornerstone of providing these human resources services for the courts is to integrate all human resources-related items into a single user experience through the exploitation of internet architecture and online distributed processing ensuring timely, accurate and integrated processing of personnel and payroll information.

Management Information Systems: $9.5 million
This category includes a collection of systems and activities to support the procurement process, the Judiciary's national web sites, collection of survey information, the national records management program, the Court Operations Support Center, and the *Guide to Judiciary Policies and Procedures*. Also included are systems to manage facilities projects and to support planning and decision-making with staffing, financial, and workload data.

Infrastructure and Collaboration Tools: $49.6 million
These tools provide support to the national IT program including testing, training, and support; maintenance and replacement of servers; e-mail messaging (including licenses, server maintenance and replacement, and help desk services); IT security and national gateways (including security support services); mainframe computer and national software licenses; IT project management; information systems architecture (and assessment of new technologies); local court grants for technology innovation; portal technology; and infrastructure for identity management services.

SALARIES AND EXPENSES continued:

3) Courtroom Technologies: $17,808,000

These funds equip courtrooms with a variety of technologies to improve the quality and efficiency of certain aspects of courtroom proceedings. These technologies include video evidence presentation systems, video conferencing systems, and electronic methods of taking the record. The use of technology in the courtroom facilitates case management, reduces trial time, litigation costs and improves fact-finding, jury understanding and access to court proceedings.

Through the implementation of CM/ECF, court case files are becoming fully electronic, and that technology is revolutionizing trial processes. To fully realize the benefits of electronic case files in the courtroom, the Judicial Conference Committee on Court Administration and Case Management recommends the expanded use of available balances derived from electronic public access fees in the Judiciary Information Technology Fund to fund court allotments for the much needed implementation of a cyclical equipment replacement and maintenance program for courtroom technologies.

Via this financial plan submission, the Judiciary seeks authority to expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. The Judiciary seeks this expanded authority as an appropriate use of EPA receipts to improve the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically through electronic public access services when it is presented electronically and becomes an electronic court record.

4) Telecommunications: $38,628,000

These funds support the judiciary's telecommunications program, and allow the judiciary to fund recurring expenses such as long distance and FTS charges, maintenance and follow-on service, relocation/reconfiguration of existing systems; and purchase or replacement of existing court systems including systems for new courthouses and prospectus alterations projects. The telecommunications program allows the judiciary to maintain telecommunications services for the appellate, district, and bankruptcy courts and for probation and pretrial services offices, and procure telecommunications equipment for new courthouses and for courthouses undergoing major repairs and alteration. Funds are provided directly to the courts for annual recurring requirements such as charges for local, commercial long distance, and cellular services. The judiciary also incurs recurring charges for FTS long distance services for both voice and data transmission.

5) Automation Support Program: $25,298,000

These funds provide for staffed operations at the Administrative Office including salaries, contractual services, and other operating expenses to provide support to the courts for data communications, network applications, and other information technology systems. The FTEs associated with these Administrative Office reimbursable positions are approved annually by the Executive Committee of the Judicial Conference. Since 1995, the number of automation support positions has declined from a high of 230 to the current 197.

Salaries and Expenses Encumbered Financing Requirements (Project Slippage)

The Salaries and Expenses financial plan also includes several areas where information technology obligations that were included in the fiscal year 2006 financial plan were delayed and the requirements, along with the funds, carried forward into fiscal year 2007. In order to provide appropriate comparisons between fiscal years, these encumbered funds are being displayed separately. A summary of the planned uses of these funds is provided below.

Financing ($000s):

	FY 2006 Financial Plan	FY 2007 Financial Plan	Percent Change
Judiciary Information Technology Fund Slippage	**$ 61,020**	**$ 53,759**	**-11.9%**

These slipped requirements include funding from project development efforts, operations and maintenance initiatives, and courtroom technology projects. The slippage is broken out as follows:

- **IT Infrastructure and Project Development $21.9 million**:
  Includes funding associated with equipment for the new bankruptcy judges, and slippage from schedule delays affecting contractual outsourcing, training, national licenses, the judiciary data center, records management, and local initiatives. A summary of slippage by IT program component is as follows:
  - Court administration and case management $1.0 million;
  - Judicial statistical and reporting systems $1.3 million;
  - Probation and pretrial services case management $0.04 million; financial systems $2.8 million;
  - Human resources systems $1.2 million;
  - Management information systems $1.9 million; and
  - Information collaboration tools $13.7 million.

- **Courtroom Technology $7.5 million:**
  Includes equipment and maintenance associated with planned installations for new bankruptcy judges and from fiscal year 2006 schedule delays.

- **Telecommunications $7.3 million**:
  Includes $6.4 million in funding for telecommunications equipment as a result of slippage in the building schedule**,** the transition to Networx, and $0.9 million from the remaining emergency communication supplemental funding.

- **Service Delivery Alternative $16.9 million:**
  Includes funding for the service delivery alternative (including deferred cyclical server maintenance funding) to identify and evaluate alternate delivery models for IT systems with the aim of selecting and implementing more cost-effective models that would reduce the number of servers nationwide.

ELECTRONIC PUBLIC ACCESS (EPA)

Financing ($000)

	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 Plan
Collections	$ 49,152	$ 62,300	$ 62,120	26.4%
Prior-year Carryforward	$ 14,376	$ 14,376	$ 32,200	124.0%
Total	**$ 63,528**	**$ 76,676**	**$ 94,320**	**48.5%**

SPENDING

($000s)	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 Plan
EPA Program Operations	$ 19,346	$ 11,560	$ 27,229	40.7%
Available to Offset Approved Public Access initiatives (e.g. CM/ECF)	$ 36,807	$ 32,916	$ 41,372	12.4%
Planned Carryforward	$ 7,325	$ 32,200	$ 25,719	251.1%
Total	**$ 63,528**	**$ 76,676**	**$ 94,320**	**48.5%**

The judiciary's Electronic Public Access (EPA) program provides for the development, implementation and enhancement of electronic public access systems in the federal judiciary. The EPA program provides centralized billing, registration and technical support services for PACER (Public Access to Court Electronic Records), which facilitates Internet access to data from case files in all court types, in accordance with policies set by the Judicial Conference. The increase in fiscal year 2007 EPA program operations includes one-time costs associated with renegotiation of the Federal Telephone System (FTS) 2001 telecommunications contract.

Pursuant to congressional directives, the program is self-funded and collections are used to fund information technology initiatives in the judiciary related to public access. Fee revenue from electronic access is deposited into the Judiciary Information Technology Fund. Funds are used first to pay the expenses of the PACER program. Funds collected above the level needed for the PACER program are then used to fund other initiatives related to public access. The development, implementation, and maintenance costs for the CM/ECF project have been funded through EPA collections. In fiscal year 2007, the judiciary plans to use $41.4 million in EPA collections to fund public access initiatives within the Salaries and Expenses financial plan including:

- CM/ECF Infrastructure and Allotments $20.6 million
- Electronic Bankruptcy Noticing $5.0 million
- Internet Gateways $8.8 million
- Courtroom Technology Allotments for Maintenance/Technology Refreshment $7.0 million (New authority requested for this item on page 46)

The fiscal year 2007 financial plan for courtroom technologies includes $7.0 million for court allotments to be funded EPA receipts to provide cyclical replacement of equipment and infrastructure maintenance.

Via this financial plan submission, the Judiciary seeks authority to expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. The Judiciary seeks this expanded authority as an appropriate use of EPA receipts to improve the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically through electronic public access services when it is presented electronically and becomes an electronic court record.

COURT OF INTERNATIONAL TRADE

The following table details the beginning balances, deposits, obligations, and carryforward balances in the JITF for the Court of International Trade for fiscal years 2006 and 2007.

Judiciary Information Technology Fund	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 plan
Balance, Start of Year	$ 598	$ 605	$ 657	9.9%
Current-year Deposits	$ 0	$ 200	$ 0	0.0%
Obligations	$ (313)	$ (148)	$ (357)	14.1%
Balance, End of Year	**$ 285**	**$ 657**	**$ 300**	**5.3%**

The Court has been using the Judiciary Information Technology Fund to upgrade and enhance its information technology needs and infrastructure. Of the $0.7 million that carried forward into fiscal year 2007 in the Judiciary Information Technology Fund, $0.4 million is planned for obligation in the fiscal year 2007 financial plan, the remaining $0.3 million will carry forward into fiscal year 2008.

These funds will be used to continue the Court's information technology initiatives, in accordance with its long-range plan, and to support the Court's recent and future information technology growth. The Court is planning to use these funds to continue the support of its newly upgraded data network and voice connections; to pay for the recurring Virtual Private Network System (VPN) phone and cable line charges; replace the Court's CM/ECF file server; purchase computer desktop systems and laptops for the Court's new digital recording system; replace computer desktop systems, printers and laptops in accordance with the judiciary's cyclical replacement program; and upgrade and support existing software applications.

EXHIBIT L

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

DANIEL K. INOUYE, HAWAII
PATRICK J. LEAHY, VERMONT
TOM HARKIN, IOWA
BARBARA A. MIKULSKI, MARYLAND
HERB KOHL, WISCONSIN
PATTY MURRAY, WASHINGTON
BYRON L. DORGAN, NORTH DAKOTA
DIANNE FEINSTEIN, CALIFORNIA
RICHARD J. DURBIN, ILLINOIS
TIM JOHNSON, SOUTH DAKOTA
MARY L. LANDRIEU, LOUISIANA
JACK REED, RHODE ISLAND
FRANK R. LAUTENBERG, NEW JERSEY
BEN NELSON, NEBRASKA

THAD COCHRAN, MISSISSIPPI
TED STEVENS, ALASKA
ARLEN SPECTER, PENNSYLVANIA
PETE V. DOMENICI, NEW MEXICO
CHRISTOPHER S. BOND, MISSOURI
MITCH McCONNELL, KENTUCKY
RICHARD C. SHELBY, ALABAMA
JUDD GREGG, NEW HAMPSHIRE
ROBERT F. BENNETT, UTAH
LARRY CRAIG, IDAHO
KAY BAILEY HUTCHISON, TEXAS
SAM BROWNBACK, KANSAS
WAYNE ALLARD, COLORADO
LAMAR ALEXANDER, TENNESSEE

TERRENCE E. SAUVAIN, STAFF DIRECTOR
BRUCE EVANS, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510–6025
http://appropriations.senate.gov

May 2, 2007

Mr. James Duff
Director
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Duff:

This letter is in response to the request for approval for the Judiciary's Fiscal Year 2007 Financial Plan, dated March 14, 2007 in accordance with section 113 of Public Law 110-5. For Fiscal Year 2007, Public Law 110-5 provided just under a five percent increase for the Judiciary over last year's level. With the increased funding provided in Fiscal Year 2007, $20.4 million is provided for critically understaffed workload associated with immigration and other law enforcement needs, especially at the Southwest Border.

We have reviewed the information included and have no objection to the financial plan including the following proposals:

- a cost of living increase for panel attorneys;
- the establishment of a branch office of the Southern District of Mississippi to allow for a federal Defender organization presence in the Northern District of Mississippi;
- a feasibility study for sharing the Judiciary's case management system with the State of Mississippi, and;
- the expanded use of Electronic Public Access Receipts.

Any alteration of the financial plan from that detailed in the March 14, 2007 document would be subject to prior approval of the Senate Committee on Appropriations.

Sincerely,

Richard J. Durbin
Chairman
Subcommittee on Financial Services
and General Government

Sam Brownback
Ranking Member
Subcommittee on Financial Services
and General Government

EXHIBIT M

May-03-07 03:01pm From- T-216 P.002/003 F-534

DAVID R. OBEY, WISCONSIN, CHAIRMAN
JOHN P. MURTHA, PENNSYLVANIA
NORMAN D. DICKS, WASHINGTON
ALAN B. MOLLOHAN, WEST VIRGINIA
MARCY KAPTUR, OHIO
PETER J. VISCLOSKY, INDIANA
NITA M. LOWEY, NEW YORK
JOSÉ E. SERRANO, NEW YORK
ROSA L. DeLAURO, CONNECTICUT
JAMES P. MORAN, VIRGINIA
JOHN W. OLVER, MASSACHUSETTS
ED PASTOR, ARIZONA
DAVID E. PRICE, NORTH CAROLINA
CHET EDWARDS, TEXAS
ROBERT E. "BUD" CRAMER, JR., ALABAMA
PATRICK J. KENNEDY, RHODE ISLAND
MAURICE D. HINCHEY, NEW YORK
LUCILLE ROYBAL-ALLARD, CALIFORNIA
SAM FARR, CALIFORNIA
JESSE L. JACKSON, JR., ILLINOIS
CAROLYN C. KILPATRICK, MICHIGAN
ALLEN BOYD, FLORIDA
CHAKA FATTAH, PENNSYLVANIA
STEVEN R. ROTHMAN, NEW JERSEY
SANFORD D. BISHOP, JR., GEORGIA
MARION BERRY, ARKANSAS
BARBARA LEE, CALIFORNIA
TOM UDALL, NEW MEXICO
ADAM SCHIFF, CALIFORNIA
MICHAEL HONDA, CALIFORNIA
BETTY McCOLLUM, MINNESOTA
STEVE ISRAEL, NEW YORK
TIM RYAN, OHIO
C.A. "DUTCH" RUPPERSBERGER, MARYLAND
BEN CHANDLER, KENTUCKY
DEBBIE WASSERMAN SCHULTZ, FLORIDA
CIRO RODRIGUEZ, TEXAS

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

JERRY LEWIS, CALIFORNIA
C. W. BILL YOUNG, FLORIDA
RALPH REGULA, OHIO
HAROLD ROGERS, KENTUCKY
FRANK R. WOLF, VIRGINIA
JAMES T. WALSH, NEW YORK
DAVID L. HOBSON, OHIO
JOE KNOLLENBERG, MICHIGAN
JACK KINGSTON, GEORGIA
RODNEY P. FRELINGHUYSEN, NEW JERSEY
ROGER F. WICKER, MISSISSIPPI
TODD TIAHRT, KANSAS
ZACH WAMP, TENNESSEE
TOM LATHAM, IOWA
ROBERT B. ADERHOLT, ALABAMA
JO ANN EMERSON, MISSOURI
KAY GRANGER, TEXAS
JOHN E. PETERSON, PENNSYLVANIA
VIRGIL H. GOODE, JR., VIRGINIA
JOHN T. DOOLITTLE, CALIFORNIA
RAY LAHOOD, ILLINOIS
DAVE WELDON, FLORIDA
MICHAEL K. SIMPSON, IDAHO
JOHN ABNEY CULBERSON, TEXAS
MARK STEVEN KIRK, ILLINOIS
ANDER CRENSHAW, FLORIDA
DENNIS R. REHBERG, MONTANA
JOHN R. CARTER, TEXAS
RODNEY ALEXANDER, LOUISIANA

CLERK AND STAFF DIRECTOR
ROB NABORS

TELEPHONE:
(202) 225-2771

May 2, 2007

Mr. James Duff
Director
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 20544

Dear Mr. Duff,

This letter is in response to the request for approval for the Judiciary's fiscal year 2007 Financial Plan, dated March 14th, 2007 in accordance with section 113 of Public Law 110-5.

We have reviewed the information included and have no objection to the financial plan including the following proposals:

- a cost of living increase for panel attorneys;
- the establishment of a branch office of the Southern District of Mississippi in the Northern District of Mississippi;
- a feasibility study for sharing the Judiciary's case management system with the state of Mississippi, and;
- the expanded use of Electronic Public Access Receipts.

Any alteration of the financial plan that differs from that detailed in the March 14, 2007 document would be subject to prior approval of the house Committee on Appropriations.

Sincerely,

José E. Serrano
Chairman
Subcommittee on Financial Services
and General Government

cc: The Honorable Ralph Regula,
Ranking Member

EXHIBIT N

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

5. Sale of Monthly Listing of Court Orders and Opinions	$19	$22
7. Returned Check Fee	$45	$53
9. Audio Recording	$26	$30
10. Document Filing/Indexing	$39	$46
11. Record Retrieval Fee	$45	$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$26	$30
2. Certification	$9	$11
4. Record Retrieval Fee	$45	$53
5. Returned Check Fee	$45	$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program's obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from $.08 to $.10 per page. The Committee also recommended that the current waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee's recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee's request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES, et al., *Plaintiffs,* v. UNITED STATES OF AMERICA *Defendant.*	Civil Action No. 16-745 (ESH)

DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE AND RESPONSE
TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 7(h), Defendant submits the following list of material facts as to which there is no genuine dispute:

1. PACER fees find their origin in a 1988 decision of the Judicial Conference to authorize "an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts[.]" Rep. of Proceedings of the Judicial Conference of the United States at 83 (Sept. 18, 1988)

2. The Judicial Conference authorized the Committee on Judicial Improvement "to establish access fees during the pendency of the program." *Id.*

3. In 1989, the Judicial Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing electronic public access to court records. *See* Rep. of Proceedings of the Judicial Conference of the United States at 19 (Mar. 14, 1989).

4. In the Judiciary Appropriations Act of 1990, Congress established the judiciary's right to retain revenues from fees generated through the provision of court records to the public. *See* Pub. L. No. 101-162, § 406(b).

5. In 1990, the Judicial Conference approved an initial rate schedule for electronic public access to court data via the PACER system. *See* Rep. of Proceedings of the Judicial Conference of the United States at 21 (Mar. 13, 1990).

6. In the Judicial Appropriations Act of 1991, Congress instituted a requirement that the Judicial Conference set a schedule of "reasonable fees … for access to information available through automatic data processing equipment." Pub. L. No. 101-515, § 404.

7. Through the Judicial Appropriations Act of 1991, Congress determined that PACER users, rather than taxpayers generally, should fund public access initiatives. Congress further required that the Judicial Conference submit each such fee schedule to Congress at least thirty days before its effective date. *See* Pub. L. No. 101-515, § 404.

8. Congress directed that all such fees collected for services rendered be deposited into the Judiciary Automation Fund ("JAF")[1] to reimburse expenses incurred in providing such services to the public. Pub. L. No. 101-515, § 404.

9. In the Judicial Appropriations Act of 1992, Congress expressly required that the Judicial Conference "shall hereafter prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, and 1930 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment." Pub. L. No. 102-140.

[1] The Judiciary Automation Fund was renamed the Judiciary Information Technology Fund. *See* 28 U.S.C. § 612.

10. Congress also allowed that fees need not be collected for all access; rather the "fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. *Id.*

11. The House Appropriations Committee report for the Judicial Appropriations Act of 1993 expressly stated that charging fees for public access was "desirable." H. Rep. No. 102-709.

12. The Judicial Conference later expanded the fee schedule to cover access to public records in appellate courts and the Court of Federal Claims. *See* Rep. of Proceedings of the Judicial Conference of the United States at 44–45 (Sept. 20, 1993); Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 15, 1994).

13. Congress also required that the public access fee schedule be expanded to cover multidistrict litigation. *See* Pub. L. No. 104-317, § 403.

14. In 1996, the Judicial Conference also approved a reduction in the fee for electronic public access for dial-up Internet connections. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 13, 1996).

15. Congress repeatedly expressed its intention that the Judicial Conference use the fees generated from electronic public access services to improve and update various public access platforms. For instance, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1997 stated:

> The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing.

S. Rep. No. 104-676 at 89.

16. In 1998, the Judicial Conference determined that with the introduction of Internet technology to the judiciary's current public access program, it would include a per-page fee for access, while introducing new technologies to expand public accessibility to information via PACER. Specifically, the Judicial Conference established a fee of $0.07 per page for access to certain court records on PACER. *See* Rep. of Proceedings of the Judicial Conference of the United States at 64–65 (Sept. 15, 1998)

17. In 2001, the Judicial Conference provided that attorneys of record and parties in a case would receive one copy of all filed documents without charge and also that no fee will be owed until an individual account holder accrues more than $10 in a calendar year. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12–13 (Mar. 14, 2001)

18. In 2002, the Judicial Conference established a fee cap for accessing any single document, where there will be no charge after the first thirty pages of a document. *See* Rep. of Proceedings of the Judicial Conference of the United States at 11 (Mar. 13, 2002).

19. In 2002, Congress passed the E-Government Act of 2002. *See* Pub. L. No. 107-347.

20. The E-Government Act amended existing law to remove the requirement that the Judicial Conference "shall hereafter prescribe fees" for public access to, instead, provide that the Judicial Conference "may, only to the extent necessary, prescribe reasonable fees." Pub. L. No. 107-347.

21. The E-Government Act also included several directives, including that all federal courts have websites with certain general court information (*e.g.*, courthouse location, contact information, local rules, general orders, docket information), that all court opinions issued after

April 16, 2005, be available in text-searchable format, and that an annual report be provided to Congress identifying any court requesting a deferral from these requirements. *See* Pub. L. No. 107-347, § 205.

22. The E-Government Act did not include any provisions regarding sources of funding for providing this information other than the "reasonable fees prescribed by the Judicial Conference for electronic access to information stored in automated data processing equipment." Pub. L. No. 102-140, § 303(a); Pub. L. No. 104-347, § 205.

23. In 2003, the House Appropriations Committee stated that it "expect[ed] the fee for the Electronic Public Access program to provide for Case Management Electronic Case File ("CM/ECF") system enhancement and operational costs." H. Rep. No. 108-221 at 116; *see also* H. Rep. No. 108-401 ("the conferees adopt the House report language concerning Electronic Public Access fees.").

24. Similarly, the Senate Appropriations Committee stated that it was "impressed and encouraged" by the "new and innovative" CM/ECF system and that it expected a report on "the savings generated by this program at the earliest date possible." S. Rep. No. 108-144 at 118.

25. In order to provide sufficient revenue to support the CM/ECF operational and maintenance costs that Congress expected, the Judicial Conference issued a new rate schedule, charging $0.08 per page. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12 (Sept. 21, 2004).

26. The Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1999 provides that the Committee "supports efforts of the judiciary to make information available to the public electronically, and expects that available balances from public access fees

in the judiciary automation fund will be used to enhance the availability of public access." S. Rep. No. 105-235, at 114.

27. In 2007, the Administrative Office of the U.S. Courts ("AO") submitted the Judiciary's Fiscal Year ("FY") 2007 Financial Plan to both the House and Senate Appropriations Committees that, among other things, provided for "expanded use of the Electronic Public Access ('EPA') revenues." Judiciary FY07 Financial Plans (Mar. 14, 2007).

28. On May 2, 2007, the Appropriations Committees sent letters to the AO, stating that the Committees had "reviewed the information included and ha[d] no objection to the financial plan including the following proposal[ ]: … the expanded use of [EPA] Receipts." Ltr. from Sens. Durbin and Brownback (May 2, 2007); Ltr. from Rep. Serrano (May 2, 2007).

29. The AO submitted its FY 2007 Financial Plan to both Appropriations Committees, outlining various courtroom technology installations and maintenance that would be funded through EPA revenues. Declaration of Wendell A. Skidgel Jr. ("Skidgel Decl."), Ex. K at 43. These expenditures were approved through the Financial Services and General Government Appropriations Act of 2008. Pub. L. No. 110–161.

30. In 2011, the Judicial Conference amended the PACER fee schedule, raising the per-page cost to $0.10. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Sept. 13, 2011).

31. The Judicial Conference noted, in raising the PACER fee schedule to $0.10 per page, the existing statutory and policy requirements of charging fees commensurate with the cost of providing existing services and developing enhanced services. *See id.*

32. The Judicial Conference also recognized that it had not increased PACER access fees since 2005 and also that its EPA obligations during the past three fiscal years had exceeded revenue. *See id.*

* * *

Pursuant to Local Rule 7(h), Defendant submits the following response to Plaintiffs' Statement of Undisputed Material Facts. As many of Plaintiffs' statements consist of immaterial facts, mischaracterizations of the record, and improper argument, all in violation of Local Rule 7(h), the fact that Defendant denies any of Plaintiffs' statements does not preclude this Court from granting Defendant's Cross-Motion for Summary Judgment. The following responds to each numbered paragraph included in Plaintiffs' Statement of Undisputed Material Facts:

1.-4. Admitted.

5. Denied, except to admit that no fee is owed for electronic access to court data or audio files via PACER until the account holder accrues charges of more than $15. A person accessing an electronically filed document for the first time who is a party in a case does not incur a fee; no fee is charged for access to judicial opinions; and no fee is charged for viewing case information or documents at courthouse public access terminals. Taylor Decl. Ex. A at 2.

6.-8. Admitted

9. Defendant admits that the language similar to that cited can be found in Exhibit B to the Taylor Declaration, but also notes that each page of the document (Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead – Discussion Draft) contains a footer stating:

> This paper was prepared by staff of the Administrative Office of the United States Courts, with substantial assistance from judges and court staff, to aid the deliberations of the Judicial Conference of the United States and its committees. The ideas expressed in this paper do not necessarily reflect the policies of the

> Conference or any committee thereof, any court of the United States, or the Administrative Office.

Taylor Decl. Ex. B.

10.-11. Admitted.

12. Defendant admits that language similar to that cited can be found in the cited statute, but denies that Plaintiffs' selective quotations from the statute present a fair reading of the enactment. *See* Pub. L. No. 107-347, § 205; Pub. L. No. 102-140, § 303; Pub. L. No. 101-515, § 404; 28 U.S.C. § 612.

13. Defendant admits that Plaintiffs have accurately quoted the selected language from the Congressional enactment found in the note to 28 U.S.C § 1913, but denies that these selective quotations present a fair reading of the enactments reflected in the legislation. *See, e.g.*, Pub. L. No. 102-140, § 303; Pub. L. No. 104-317, § 403; Pub. L. No. 107-347, § 205.

14. Defendant admits that, where a per-page fee was charged, it was not reduced, but notes that the Judiciary did, as contemplated in the E-Government Act, increase the amount of data it made freely available. Taylor Decl. Ex. L.

15. Defendant admits this statement and notes that "[t]his increase is predicated upon Congressional guidance that the judiciary is expected to use Pacer fee revenue to fund CM/ECF operations and maintenance." Taylor Decl. Ex. E.

16. Defendant admits this statement, except to note that the correct terminology for what Plaintiffs call a surplus is an unobligated available balance, as allowed for in the legislation creating the Judiciary Information Technology Fund ("JITF"). 28 U.S.C. § 612; Pub. L. No. 101-162, § 404(b)(1).

17. Defendant admits that Plaintiffs have accurately quoted the selected language from the cited document, but denies that their selective quotations from the document present a fair reading

of the contents, noting, for instance, that Plaintiffs have omitted the following language from Exhibit F (JITF annual report): "in accordance with authorizing legislation"; "with the authorization of Congress." Taylor Decl. Ex. F. Defendant further notes that the "Judiciary asked for and received written consent from the Appropriations Committees to use Electronic Public Access ('EPA') receipts to support courtroom technology allotments." Ltr. from Sen. Lieberman (Taylor Decl. Ex. G at 4), *see also* Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M).

18. Defendant admits that Plaintiffs have accurately quoted the selected language from the cited testimony, but denies that their selective quotations from the testimony present a fair reading of the contents, noting, for instance, that Plaintiffs have omitted the pertinent part of Judge Gibbons' statement that reads: "*Congress has authorized* the Judiciary to utilize these fees to run the PACER program as well as to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds. The Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds." *See* www.uscourts.gov/file/3563/download (emphasis added).

19. Admitted.

20. Plaintiffs claim that the sole support that Director Duff offered for the view that the Judiciary was charging PACER fees only to the extent necessary was a 2004 conference report is false. Director Duff explained that "many services and documents are provided to the public for free, and charges that are imposed are the minimum possible only to recover costs." Ltr. from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009) (Taylor Decl. Ex. I). The letter further explained: "And that as such, the Judiciary believed it was meeting the E-

Government Act's requirements to promote public access to federal court documents while recognizing that such access cannot be entirely free of charge." *Id.* The Director also reminded Senator Lieberman that eighteen years earlier, Congress mandated that the Judiciary charge user fees for electronic access to court files as a way to pay for this service." *Id.* And that, "[s]ince that time, various legislative directives have amended the mandate, mostly to expand the permissible use of the fee revenue to pay for other services related to the electronic dissemination of court information, such as the Case Management/Electronic Case Files ('CM/ECF') system and an Electronic Bankruptcy Noticing ('EBN') system." *Id.* The letter included a citation to H. Rep. No. 108-401, at 614 (adopting the language of H. Rep. No. 108-221).

21. Admitted, except to note that Plaintiffs fail to disclose that in the cited annual letter to the Appropriations Committee, Senator Lieberman expressly acknowledged that "the judiciary asked for and received written consent from the House and Senate Appropriations Committees, to "expand use of [EPA] receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Taylor Decl. Ex. G.

22. Admitted, except to note that Plaintiffs state that in the EPA program Summary (Taylor Decl. Ex. J) the AO posits that the fees comply with the E-Government Act because they "are only used for public access, and are not subject to being redirected for other purposes." Defendant notes that the preceding sentences state, in part:

> In order to maintain the level of service presently provided through the public access program, the Judiciary would need appropriated funds to replace the fee revenue, and in this fiscal climate increased appropriations are not available. Fee revenue allows the Judiciary to pursue new technologies for providing public access, develop prototype programs to test the feasibility of new public access technologies, and develop enhancements to existing systems. By authorizing the fee, Congress has provided the Judiciary with revenue that is dedicated solely to promoting and enhancing public access. These fees are only used for public access, and are not subject to being redirected for other purposes. The fee, even a nominal

> fee, also provides a user with a tangible, financial incentive to use the system judiciously and efficiently, and in the absence of a fee the system can be abused.

Taylor Decl. Ex. J.

23. Defendant admits the assertions in this paragraph, but also notes that all of the 2012 expenditures listed in Plaintiffs' Exhibit K, were contained in the Judiciary's 2012 spending plan, and were approved by Congress. *See* Taylor Decl. Ex. K (Defendant's 2012 spending plan, and Plaintiff's 2012 House and Senate Appropriations Reports).

24. The first sentence is a characterization rather than a fact, which characterization is not supported by the citation; the second sentence is admitted, but Defendant notes that the spending amounts made "information available to the public electronically" and were included in the Judiciary's yearly spending plan, was approved by Congress. *See* Judiciary FY07 Financial Plans (Mar. 14, 2007) (Skidgel Decl. Ex. K); 2007 spending plan, Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M)); S. Rep. No. 105-235 at 114 (stating that "[t]he Committee ... expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.)"

25. Defendant admits this assertion and notes that this was done in accordance with Congressional directives, and is consistent with Public Law 102-140, which states that fees collected shall be used "to reimburse expenses incurred in providing these services." Pub. L. No. 102-140.

26. Defendant admits this assertion and notes that the Judiciary requested and received written consent from the Congressional Appropriators to use EPA funds for courtroom technology. *See* Judiciary FY07 Financial Plans (Mar. 14, 2007) (Skidgel Decl. Ex. K); 2007 spending plan,

Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M)).

28. Defendant admits this assertion and notes that the Judiciary spent $110,985,208, which was $8.4 million more than was received in Fiscal Year 2010.

29. The cost of the EPA program in 2010 was $110,985,208, not $18,768,552 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 2 (line 50). It appears that Plaintiffs' assertion resulted from extracting a number from a place-holder subheading, under the Public Access Services and Applications Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Taylor Decl. Ex. L.

30. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph and Plaintiffs appear to confuse the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 8, which is a description attached to Budget Organization Code ("BOC") OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. Taylor Decl. Ex. L. at 1–2 lines 6–50 (listing the expenditures for the Judiciary's entire EPA program).

31. Admitted.

32. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

33. Admitted.

34. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information[,]" H. Rep. No 104-676 at 89, and that the overall quality of service to the public will be improved with the availability of enhancements such as … enhanced use of the Internet," *id.*

35. Admitted.

36. Defendant admits this assertion and notes that Congress did "urge[] the judiciary to undertake a study of whether sharing such technology, including electronic billing processes, is a viable option." S. Rep. No. 109-293 at 176.

37. Admitted.

38. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as … electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

39.-40. Admitted.

41. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, the following are direct costs associated with development and maintenance of CM/ECF: Software Development,

Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF. Skidgel Decl. ¶ 17.

42. Admitted.

43. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

44. Admitted.

45. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements

to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

46. Admitted.

47. The cost of the EPA program in 2011 was $108,665,271, not $3,363,770 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 4 (line 64). It appears that Plaintiffs' assertion results from extracting a number from a placeholder subheading, under the Public Access Services and Applications Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

48. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 3–4 lines 9–64 (listing the expenditures for the Judiciary's entire EPA program).

49. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

50. Admitted.

51. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

52. Admitted.

53. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information." H. Rep. No. 104-676 at 89, and, that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." *Id.*

54. Admitted.

55. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

56. Admitted.

57. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Files system enhancements and

operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

58. Admitted.

59. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

60. Admitted.

61. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the

Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

62. Admitted.

63. The cost of the EPA program in 2012 was $120,176,766, not $3,547,279 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 7 (line 57). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

64. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 11, which is a description attached to BOC OXEEPAX but is not an accurate representation of

the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 6–7 lines 9–57 (listing the expenditures for the Judiciary's entire EPA program).

65. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

66. Admitted.

67. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L & M.

68. Admitted.

69. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information." H. Rep. No. 104-676 at 89. And that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." *Id.*

70. Admitted.

71. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

72. Admitted.

73. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

74. Admitted.

75. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

76. Admitted.

77. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at

89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

78. Admitted.

79. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

80. Admitted.

81. The cost of the EPA program in 2013 was $143,339,525, not $4,652,972 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 11 (line 66). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

82. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 14, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 9–11 lines 12–66. (listing the expenditures for the Judiciary's entire EPA program).

83. Denied, except as admitted in the paragraphs that follow. Plaintiffs offers no citation in support of this enumerated paragraph.

84. Admitted.

85. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

86. Admitted.

87. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements

to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

88. Admitted.

89. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

90. Admitted.

91. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

92. Admitted.

93. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development,

Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

94. Admitted.

95. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

96. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements

to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303.

97. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

98. Admitted.

99. Denied. The cost of the EPA program in 2014 was $142,855,084, not $3,547,279 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 13 (line 57). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

100. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 10, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 12–13 lines 8–56 (listing the expenditures for the Judiciary's entire EPA program).

101. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

102. Admitted.

103. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

104. Admitted.

105. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information." H. Rep. No. 104-676 at

89. And, that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet" *Id.*

106. Admitted.

107. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as … enhanced use of the Internet." H. Rep. No. 104-676 at 89.

108. Admitted.

109. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

110. Admitted.

111. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace

CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

112. Admitted.

113. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

114. Admitted.

115. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements

to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303.. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

116. Admitted.

117. Denied. The cost of the [EPA] program in 2015 was $147,722,744, not $2,575,977 plus $642,160 as plaintiffs claim. *See* Taylor Decl. Ex. L. at 16 (line 60). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's EPA program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

118. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 14–16 lines 10–60 (listing the expenditures for the Judiciary's entire EPA program).

119. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

120. Admitted.

121. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

122. Admitted.

123. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information," and "that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

124. Admitted.

125. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

126. Admitted.

127. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

128. Admitted.

129. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

130. Admitted.

131. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for

services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

132. Admitted.

133. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

134. Admitted.

135. Denied. The cost of the Electronic Public Access Program in 2016 was $150,814,134, not $748,495 plus $2,443,614 as plaintiffs claim. Taylor Decl. Ex. L. at 19 (line 60). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's EPA program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

136. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 17–19 lines 10–60 (listing the expenditures for the Judiciary's entire EPA program).

137. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

138. Admitted.

139. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

140. Admitted.

141. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through

improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

142. Admitted.

143. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

144. Admitted.

145. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as ... electronic bankruptcy noticing." H. Rep. No. 104-676 at 89.

146. Admitted.

147. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize

or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

148. Admitted.

149. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

150. Admitted.

151. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements

to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA allotments, courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server). Funding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors. Skidgel Decl. ¶ 19.

152. This purported fact exceeds the Court's limitation on the subject of the current briefing (*i.e.* motions as to liability), because it addresses what damages, if any, may exist. Defendant reserves the right to seek discovery into such an issue, should it be deemed significant. Moreover, the purported fact is not material to liability (or damages) because it alone does not reflect the cost of disseminating court information through PACER or otherwise in that the CM/ECF system is more than a data storage system. Accordingly, reliance on cost of data storage alone, without factoring in the other costs associated with PACER and CM/ECF (*e.g.*, security), does not provide a meaningful analysis of the relevant expenses. Indeed, Plaintiffs' own experts, (Lee and Lissner) readily admit that "as outside analysts with limited information, we cannot anticipate or account for all of the costs that could conceivably be associated with access to PACER records." Lee & Lissner Decl. at 10 (ECF No. 52-15).

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

2024-1757

Volume II (Appx3443-4323)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellee.

v.

ERIC ALAN ISAACSON, Interested Party-Appellant

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

CORRECTED JOINT APPENDIX
VOLUME II (Appx3443-4323)

ERIC ALAN ISAACSON
6580 Avenida Mirola
LAW OFFICE OF ERIC ALAN ISAACSON
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
Email: ericalanisaacson@icloud.com

Interested Party-Appellant

Table of Contents

Volume III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

ORDER

For the reasons stated in an accompanying Memorandum Opinion, ECF No. 89, it is hereby

ORDERED that plaintiffs' motion for summary judgment as to liability, ECF No. 52, is **DENIED**; and it is further

ORDERED that defendant's cross-motion for summary judgment as to liability, ECF No. 73, is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that the parties shall confer and file a Joint Status Report with a proposed schedule for further proceedings by **April 16, 2018**; and it is further

ORDERED that a Status Conference is scheduled for **April 18, 2018, at 3:00 p.m.** in Courtroom 23A.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: March 31, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

MEMORANDUM OPINION

The federal judiciary's Public Access to Court Electronic Records ("PACER") system, which is managed by the Administrative Office of the United States Courts ("AO"), provides the public with online access to the electronic records of federal court cases. The fees for using PACER are established by the Judicial Conference of the United States Courts and set forth in the judiciary's Electronic Public Access ("EPA") Fee Schedule. In this class action, users of the PACER system contend that the fees charged from 2010 to 2016 violated federal law, *see* 28 U.S.C. § 1913 note (enacted as § 404 of the Judiciary Appropriations Act, 1991, Pub. L. 101-515, 104 Stat. 2101 (Nov. 5, 1990) and amended by § 205(e) of the E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (Dec. 17, 2002)). Before the Court are the parties' cross-motions for summary judgment as to liability. (*See* Pls.' Mot. Summ. J., ECF No. 52; Def.'s Cross-Mot. Summ. J., ECF No. 73.) For the reasons stated herein, the Court will deny plaintiffs' motion and grant in part and deny in part defendant's motion.

BACKGROUND

I. FACTUAL BACKGROUND

Although the present litigation is a dispute over whether, during the years 2010–2016, the PACER fees charged violated 28 U.S.C. § 1913 note, the relevant facts date back to PACER's creation.[1]

A. Origins of PACER and the Judiciary's Electronic Public Access ("EPA") Fee Schedule

In September 1988, the Judicial Conference "authorized an experimental *program of electronic access for the public to court information* in one or more district, bankruptcy, or appellate courts in which the experiment can be conducted at nominal cost, and delegated to the Committee [on Judicial Improvements] the authority to establish access fees during the pendency of the program." (Rep. of Proceedings of the Jud. Conf. of the U.S. ("Jud. Conf. Rep.") at 83 (Sept. 18, 1988) (emphasis added) (Ex. A to the Decl. of Wendell Skidgel, Nov. 11, 2017, ECF No. 73-2 ("Skidgel Decl.")); *see also* Def.'s Statement Facts ¶¶ 1-2, ECF No. 73-3 ("Def.'s Facts")). The following year, the Federal Judicial Center initiated pilot PACER programs in several bankruptcy and district courts. (*See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program at 1 ("EPA Chronology") (Ex. C to the Decl. of Jonathan Taylor, Aug. 28, 2017, ECF No. 52-1 ("Taylor Decl.")).)

In February 1990, during a hearing on judiciary appropriations for 1991, a subcommittee of the House Committee on Appropriations took up the judiciary's "request[] [for] authority to collect fees for access to information obtained through automation." *Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1991: Hearing Before*

[1] The facts set forth herein are undisputed.

a Subcomm. of the H. Comm. on Appropriations, 101st Cong. 323 (1990) ("1990 Hrg."). It asked a representative for the judiciary whether there were "any estimates on how much you will collect and will this fee help offset some of your automation costs." *Id*. at 324. The response from the judiciary was that "estimates of the revenue that will be generated from these fees are not possible due to the lack of information on the number of attorneys and individuals who have the capability of electronic access," but that there "ha[d] been a great deal of interest expressed" and it was "anticipated that the revenue generated will offset a portion of the Judiciary's cost of automation." *Id*. The Senate Report on 1991 appropriations bill noted that it "included language which authorizes the Judicial Conference to prescribe reasonable fees for public access to case information, *to reimburse the courts for automating the collection of the information*." S. Rep. No. 101-515, at 86 (1990) ("1990 S. Rep.") (emphasis added).

In March 1990, "barring congressional objection," the Judicial Conference "approved an initial rate schedule for electronic public access to court data [in the district and bankruptcy courts] via the PACER system." (Jud. Conf. Rep. at 21 (Mar. 13, 1990) (Skidgel Decl. Ex. C); Def.'s Facts ¶ 5.)[2]

Then, in November 1990, Congress included the following language in the Judiciary Appropriations Act of 1991:

> (a) The Judicial Conference shall prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, and 1930 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the

[2] At that time, "PACER allow[ed] a law firm, or other organization or individual, to use a personal computer to access a court's computer and extract public data in the form of docket sheets, calendars, and other records." (Jud. Conf. Rep. at 21 (Mar. 13, 1990).) The initial fee schedule included a Yearly Subscription Rate ($60 per court for commercial users; $30 per court for non-profits) and a Per Minute Charge ($1 per minute for commercial users; 50 cents per minute for non-profits). (*Id*.)

> fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Pub. L. 101-515, § 404, 104 Stat. 2101 (Nov. 5, 1990) (codified at 28 U.S.C. § 1913 note).[3]

Three aspects of this law are relevant to this litigation: (1) the Judicial Conference was given the authority (indeed, it was required) to charge reasonable fees for "access to information available through automatic data processing equipment,"[4] which covered its newly-developed PACER

---

[3] The statutory sections referenced authorize the federal courts to charge certain fees. *See* 28 U.S.C. § 1913 (fees for courts of appeals); *id* § 1914 (fees for district courts); *id*. § 1926 (fees for Court of Federal Claims); *id*. § 1930 (fees for bankruptcy courts).

[4] The term "automatic data processing equipment" is not defined in 28 U.S.C. § 1913 note, but it was defined in 28 U.S.C. § 612 as having "the meaning given that term in section 111(a)(2)(A) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(a)(2)(A))," which at that time defined it as:

> . . . any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information—
>
> . . .
>
> (B) Such term includes—
>
> (i) computers;
> (ii) ancillary equipment;
> (iii) software, firmware, and similar procedures;
> (iv) services, including support services; and
> (v) related resources as defined by regulations issued by the Administrator for General Services.

system; (2) the Director of the AO was required to publish a "schedule of reasonable fees for electronic access to information"; and (3) the fees collected by the judiciary pursuant to that fee schedule were to be deposited in the Judiciary Automation Fund[5] "to reimburse expenses incurred in providing these services." *Id*.

In the summer of 1992, the House Committee on Appropriations issued a report that "note[d] that the Judiciary's investments in automation have resulted in enhanced service to the public and to other Government agencies in making court records relating to litigation available by electronic media" and "request[ed] that the Judiciary equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so." H.R. Rep. No. 102-709, at 58 (July 23, 1992) ("1992 H.R. Rep.") (report accompanying appropriations bill for the judiciary for fiscal year ("FY") 1993).[6]

---

[5] Congress had established the Judiciary Automation Fund ("JAF") in 1989 to be "available to the Director [of the AO] without fiscal year limitation for the procurement (by lease, purchase, exchange, transfer, or otherwise) of automatic data processing equipment for the judicial branch of the United States" and "for expenses, including personal services and other costs, for the effective management, coordination, operation, and use of automatic data processing equipment in the judicial branch." *See* Pub. L. 101-162, 103 Stat 988 (1989) (codified at 28 U.S.C. § 612(a)). Before 28 U.S.C. § 1913 note was enacted, PACER fees were required to be deposited in the U.S. Treasury. (*See* Jud. Conf. Rep. at 20 (Mar. 14, 1989) (Skidgel Decl. Ex. B).) In 1989, the Judicial Conference, "[o]bserving that such fees could provide significant levels of new revenues at a time when the judiciary face[d] severe funding shortages," had "voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing public access to court records"; determined that it would try to change that. (*See id*.; Def.'s Facts ¶ 3; *see also* Jud. Conf. Rep. at 21 (Mar. 13, 1990) (noting that the FY 1990 appropriations act provided that the judiciary was "entitled to retain the fees collected for PACER services in the bankruptcy courts," and that the Conference would "seek similar legislative language to permit the judiciary to retain the fees collected for district court PACER services").)

[6] According to this report, the Committee believed that "more than 75 courts are providing this service, most of them at no charge to subscribers"; that "approximately a third of current access to court records is by non-Judiciary, governmental agencies" and that "fees for access in these instances are desirable"; and that it was "aware that a pilot program for the collection of fees ha[d] been successfully implemented in the Courts and encourage[d] the Judiciary to assess charges in all courts, in accordance with the provisions of section 404(a) of P.L. 101-515[.]"

In 1993, the Judicial Conference amended the fee schedules for the Courts of Appeals to include a "fee for usage of electronic access to court data" for "users of PACER and other similar electronic access systems," while deciding not to impose fees for another "very different electronic access system" then in use by the appellate courts. (Jud. Conf. Rep. at 44–45 (Sept. 20, 1993) (Skidgel Decl. Ex. D).)[7] In 1994, the Judicial Conference approved a "fee for usage of electronic access to court data" for the Court of Federal Claims. (Jud. Conf. Rep. at 16 (Mar. 15, 1994) (Skidgel Decl. Ex. E).) Finally, in March 1997, it did the same for the Judicial Panel on Multidistrict Litigation. (Jud. Conf. Rep. at 20 (Mar. 11, 1997)[8]; Def.'s Facts ¶ 13.)

B. EPA Fees Before the E-Government Act (1993–2002)

As the Judicial Conference was adding EPA fees to the fee schedules for additional courts, it became apparent that the "income accruing from the fee[s] w[ould] exceed the costs of providing the service." (Jud. Conf. Rep. at 13–14 (Mar. 14, 1995).) Accordingly, after noting that this revenue "is to be used to support and enhance the electronic public access systems," the Judicial Conference reduced the fee from $1.00 to 75 cents per minute in 1995. (*Id.*) In 1996, after noting that the previous reduction had been "to avoid an ongoing surplus," it "reduce[d] the

---

1992 H.R. Rep. at 58.

[7] The Judicial Conference Report explained that:

> Some appellate courts utilize a very different electronic access system called Appellate Court Electronic Services (ACES) (formerly known as Electronic Dissemination of Opinions System (EDOS)). The Committee determined that, at this time, the costs of implementing and operating a billing and fee collection system for electronic access to the ACES/EDOS system would outweigh the benefit of the revenues to be generated.

(Jud. Conf. Rep. at 44 (Sept. 20, 1993).)

[8] Legislation authorizing the Judicial Conference to establish a fee schedule for the Judicial Panel on Multidistrict Litigation was enacted in 1996. *See* Pub. L. No. 104-317 (1996) § 403(b), Oct. 19, 1996, 110 Stat. 3854 (codified at 28 U.S.C. § 1932).

fee for electronic public access further," from 75 to 60 cents per minute. (Jud. Conf. Rep. at 16 (Mar. 13, 1996) (Skidgel Decl. Ex. F); *see also* EPA Chronology at 1; Def.'s Facts ¶ 14.)

Shortly after the 1996 fee reduction, the House and Senate Appropriations Committees issued reports that included commentary on the judiciary's EPA fees. The House Report stated:

> The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. *The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing.*

H.R. Rep. No. 104-676, at 89 (July 16, 1996) (emphasis added) ("1996 H.R. Rep."). The Senate Report stated that:

> The Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.

S. Rep. No. 104-353, at 88 (Aug. 27, 1996) ("1996 S. Rep.").

Soon thereafter, "the judiciary started planning for a new e-filing system called ECF [Electronic Case Filing]." (Pls.' Statement Facts ¶ 9, ECF No. 52-16 ("Pls.' Facts").) In March 1997, the staff of the AO prepared a paper, entitled "Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead," "to aid the deliberations of the Judicial Conference in this endeavor," which would allow courts to maintain complete electronic case files. (Taylor Decl. Ex. B, at 36 ("1997 AO Paper").) In discussing how the ECF system could be funded, the paper discussed the possibility of charging a separate fee for ECF, but also opined that "[s]tarting with fiscal year 1997, the judiciary has greater freedom in the use of revenues generated from electronic public access fees" because "the [1996] House and Senate

appropriations committee reports . . . include[d] language expressly approving use of these monies for electronic filings, electronic documents, use of the Internet, etc." (1997 AO Paper at 36; *see* Pls.' Facts ¶ 9; *see also* Second Decl. of Wendell Skidgel, March 14, 2018, ECF 81-1 ("2d Skidgel Decl."), Tab 1 ("FY 2002 Budget Request") ("Fiscal year 1997 appropriations report language expanded the judiciary's authority to use these funds to finance automation enhancements that improve the availability of electronic information to the public.").) In the summer of 1998, the Senate Appropriations Committee reiterated its view that it "support[ed] efforts of the judiciary to make information available to the public electronically, and expect[ed] that available balances from public access fees in the judiciary automation fund will be used to enhance the availability of public access." S. Rep. No. 105-235, at 114 (July 2, 1998) ("1998 S. Rep.").

At some point, "a web interface was created for PACER" and the Judicial Conference prescribed the first Internet Fee for Electronic Access to Court Information, charging 7 cents per page "for public users obtaining PACER information through a federal judiciary Internet site." (Jud. Conf. Rep. at 64 (Sept. 15, 1998) (Skidgel Decl. Ex. G); *see* EPA Chronology at 1.) The Judicial Conference stated in its report that

> The revenue from these fees is used exclusively to fund the full range of electronic public access (EPA) services. With the introduction of Internet technology to the judiciary's current public access program, the Committee on Court Administration and Case Management recommended that a new Internet PACER fee be established to maintain the current public access revenue while introducing new technologies to expand public accessibility to PACER information.

(Jud. Conf. Rep. at 64 (Sept. 15, 1998).)[9]

[9] At the same time, the Judicial Conference "addressed the issue of what types of data or information made available for electronic public access should have an associated fee and what types of data should be provided at no cost." (Jud. Conf. Rep. at 64–65 (Sept. 15, 1998).) It concluded that while it "prescribed a fee for access to court data obtained electronically from the

In March 2001, the Judicial Conference eliminated the EPA fees from the court-specific miscellaneous fee schedules and replaced them with "an independent miscellaneous EPA fee schedule that would apply to all court types." (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001) (Skidgel Decl. Ex. H); *see also* EPA Chronology at 1.) At the same time, it amended the EPA fee schedule to provide: (1) that attorneys of record and parties in a case would receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer, which could then be printed and saved to the recipient's own computer or network; (2) that no fee is owed by a PACER user until charges of more than $10 in a calendar year are accrued; (3) a new fee of 10 cents per page for printing paper copies of documents through public access terminals at clerks' offices; and (4) a new PACER Service Center search fee of $20.[10] (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001).) In 2002, the Judicial Conference further amended the EPA fee schedule "to cap the charge for accessing any single document via the Internet at the fee for 30 pages."[11] (Jud. Conf. Rep. at 11 (Mar. 13, 2002) (Skidgel Decl. Ex. I).)

Starting no later than fiscal year 2000,[12] the judiciary was using its EPA fees to pay for

---

public dockets of individual case records in the court," courts should be allowed to "provide other local court information at no cost," such as local rules, court forms, news items, court calendars, opinions designated by the court for publication, and other information—such as court hours, court location, telephone listings—determined locally to benefit the public and the court." (*Id.*)

[10] At the time, "[t]he PACER Service Center provide[d]s registration, billing, and technical support for the judiciary's EPA systems and receive[d] numerous requests daily for particular docket sheets from individuals who d[id] not have PACER accounts." (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001).)

[11] The Judicial Conference took this step because otherwise "the fee is based upon the total number of pages in a document, even if only one page is viewed, because the case management/electronic case files system (CM/ECF) software cannot accommodate a request for a specific range of pages from a document," which "can result in a relatively high charge for a small usage." (Jud. Conf. Rep. at 11 (Mar. 13, 2002).)

[12] The record does not include any specifics as to the use of EPA fees prior to FY 2000.

PACER-related costs, CM/ECF-related costs, and Electronic Bankruptcy Noticing ("EBN").[13] (*See* 2d Skidgel Decl. ¶¶ 31–33 & Tabs 30–32 ("expenditures relating to the Judiciary's Electronic Public Access Program" for FY 2000–2002).)

C. E-Government Act of 2002

In December 2002, Congress passed the E-Government Act of 2002. Section 205 pertained to the "Federal Courts. Subsection (a) required all courts to have "individual court websites" containing certain specified information or links to websites that include such information (e.g., courthouse location, contact information, local rules, general orders, docket information for all cases, access to electronically filed documents, written opinions, and any other information useful to the public)"; subsection (b) provided that "[t]he information and rules on each website shall be updated regularly and kept reasonably current; subsection (c), entitled "Electronic Filings," provided that, with certain exceptions for sealed documents and privacy and security concerns, "each court shall make any document that is filed electronically publicly available online"; subsection (d), entitled "Dockets with links to documents" provided that "[t]he Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case"; and subsections (f) and (g) address the time limits for courts to comply with the above requirements. E-Government Act of 2002, § 205(a)–(d), (f), and (g) (codified at 44 U.S.C. § 3501 note). Subsection (e), entitled Cost of Providing Electronic Docketing Information, "amend[ed] existing law regarding the fees that the Judicial Conference prescribes for access to electronic information" by amending the first sentence of 28 U.S.C. §

[13] A line item amount expended from EPA fees for Electronic Bankruptcy Noticing appears in AO's accounting of EPA fees for FY 2000, but not for 2001 or 2002. (*See* 2d Skidgel Decl. Tabs 30–32.)

1913 note to replace the words "shall hereafter" with "may, only to the extent necessary." E-Government Act of 2002, § 205(e). The E-Government Act left the remainder of 28 U.S.C. § 1913 note unchanged.

The Senate Governmental Affairs Committee Report describes Section 205 as follows:

> Section 205 requires federal courts to provide greater access to judicial information over the Internet. Greater access to judicial information enhances opportunities for the public to become educated about their legal system and to research case-law, and it improves access to the court system. The mandates contained in section 205 are not absolute, however. Any court is authorized to defer compliance with the requirements of this section, and the Judicial Conference of the United States is authorized to promulgate rules to protect privacy and security concerns.

S. Rep. No. 107-174, at 23 (June 24, 2002) ("2002 S. Rep.") (Taylor Decl. Ex. D). As to the amending language in subsection 205(e), the report stated:

> The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

2002 S. Rep. at 23.

D. EPA Fees After the E-Government Act

1. 2003–2006

After the passage of the E-Government Act, the judiciary continued to use EPA fees for the development of its CM/ECF system. (*See* Taylor Decl. Ex. F (FY 2006 Annual Report for the Judiciary Information Technology Fund ("JITF") (formerly the "Judiciary Automation Fund")[14] ("The entire development costs for the Case Management/Electronic Case Files

[14] In 2005, 28 U.S.C. § 612 had been amended to substitute "Judiciary Information Technology

(CM/ECF) project have been funded solely through EPA collections.").)

In 2003, a report from the House Appropriations Committee stated that: "The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." H.R. Rep. No. 108-221, at 116 (July 21, 2003) ("2003 H.R. Rep."). The Senate Appropriations Committee also expressed its enthusiasm for CM/ECF:

> The Committee fully supports the Judiciary's budget request for the Judiciary Information Technology Fund [JITF]. The Committee would like to see an even greater emphasis on automation in the local courts. To this end, the Committee expects the full recommended appropriation for the JITF, as reflected in the budget request, be deposited into this account. The Committee lauds the Judicial Committee on Information Technology (IT Committee) and their Chairman for their successes helping the Courts run more efficiently through the use of new automation. Of particular note, the Committee is impressed and encouraged by the new Case Management/Electronic Case File system [CM/ECF]. This new and innovative system allows judges, their staffs, the bar and the general public to work within the judicial system with greater efficiency. This new system is currently implemented in many bankruptcy and district courts and will soon begin implementation in the appellate courts. The CM/ECF system is already showing its potential to revolutionize the management and handling of case files and within the next few years should show significant cost savings throughout the Judiciary. The Committee on Appropriations expects a report on the savings generated by this program at the earliest possible date.

S. Rep. No. 108-144, at 118 (Sept. 5, 2003) ("2003 S. Rep."). The associated Conference Committee report "adopt[ed] by reference the House report language concerning Electronic Public Access fees." *See* 149 Cong Rec. H12323, at H12515 (Nov. 23, 2003) ("2003 Conf. Rep.").

In September 2004, the Judicial Conference, "[i]n order to provide sufficient revenue to fully fund currently identified case management/electronic case files system costs," "increase[d]

Fund" for "Judiciary Automation Fund" and "information technology" for "automatic data processing."

the fee for public users obtaining information through a federal judiciary Internet site from seven to eight cents per page." (Jud. Conf. Rep. at 12 (Sept. 21, 2004) (Skidgel Decl. Ex. J); *see also* EPA Chronology at 2; Taylor Decl. Ex. E (Oct. 21, 2004 AO memorandum) ("This increase is predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance. The fee increase will enable the judiciary to continue to fully fund the EPA Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter.").)

The judiciary's Financial Plan for fiscal year 2006 described its EPA program at the time:

> The judiciary's Electronic Public Access (EPA) program provides for the development, implementation and enhancement of electronic public access systems in the federal judiciary. The EPA program provides centralized billing, registration and technical support services for PACER (Public Access to Court Electronic Records), which facilitates Internet access to data from case files in all court types, in accordance with policies set by the Judicial Conference. The increase in fiscal year 2006 EPA program operations includes one-time costs associated with renegotiation of the Federal Telephone System (FTS) 2001 telecommunications contract.
>
> Pursuant to congressional directives, the program is self-funded and collections are used to fund information technology initiatives in the judiciary related to public access. Fee revenue from electronic access is deposited into the Judiciary Information Technology Fund. Funds are used first to pay the expenses of the PACER program. Funds collected above the level needed for the PACER program are then used to fund other initiatives related to public access. The development and implementation costs for the CM/ECF project have been funded through EPA collections. Beginning last year, in accordance with congressional direction, EPA collections were used to support CM/ECF operations and maintenance as well. In fiscal year 200[6], the judiciary plans to use EPA collections to continue PACER operations, complete CM/ECF development and implementation, and operate and maintain the installed CM/ECF systems in the various courts across the country.

(2d Skidgel Decl. Tab 9 (FY 2006 Financial Plan at 45).)

2. 2006–2009

In July 2006, the Senate Appropriations Committee issued a report pertaining to the 2007

appropriations bill in which it stated: "The Committee supports the Federal judiciary sharing its case management electronic case filing system at the State level and urges the judiciary to undertake a study of whether sharing such technology, including electronic billing processes, is a viable option." S. Rep. No. 109-293, at 176 (July 26, 2006) ("2006 S. Rep.") (2d Skidgel Decl. Tab 38).

By the end of 2006, "resulting from unanticipated revenue growth associated with public requests for case information," the judiciary found that its EPA fees fully covered the costs of its "EPA Program" and left it with an "unobligated balance" of $32.2 million from EPA fees in the JITF. (FY 2006 JITF Annual Rep. at 8; Pls.' Facts ¶ 16.) In light of this "unobligated balance," the judiciary reported that it was "examining expanded use of the fee revenue in accordance with the authorizing legislation." (FY 2006 JITF Annual Rep. at 8.)

In March 2007, the judiciary submitted its financial plan for fiscal year 2007 to the House and Senate Appropriations Committees. (Def.'s Facts ¶ 27.) In the section of the plan that covered the JITF, it proposed using EPA fees "first to pay the expenses of the PACER program" and then "to fund other initiatives related to public access." (Skidgel Decl. Ex. K (FY 2007 Financial Plan at 45).) It identified the "public access initiatives" that it planned to fund with EPA fees as CM/ECF Infrastructure and Allotments; EBN; Internet Gateways; and Courtroom Technology Allotments for Maintenance/Technology Refreshment. (*Id.*) With respect to Courtroom Technology, the plan requested "expanded authority" to use EPA fees for that purpose:

> Via this financial plan submission, the Judiciary seeks authority to expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. The Judiciary seeks this expanded authority as an appropriate use of EPA receipts to improve the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically

> through electronic public access services when it is presented electronically and becomes an electronic court record.

(FY 2007 Financial Plan at 43, 46.) With no specific reference to EPA fees, the plan also sought

> spending authority to implement a Memorandum of Agreement with the State of Mississippi to undertake a three-year study of the feasibility of sharing the Judiciary's case management electronic case filing system at the state level, to include electronic billing processes. The estimated cost of this three year pilot will not exceed $1.4 million.

(*Id*. at 41.) In May 2007, the FY 2007 Financial Plan was approved by the House and Senate Appropriations Committees, with the approval letter signed on May 2, 2007, by the Chairman and the Ranking Member of the Subcommittee on Financial Services and General Government, stating that there was no objection to "the expanded use of Electronic Public Access Receipts" or "a feasibility study for sharing the Judiciary's case management system with the State of Mississippi." (Skidgel Decl. Ex. L ("FY 2007 Senate Approval Letter"); *id*. Ex. M ("FY 2007 House Approval Letter").)

The judiciary began using EPA fees to pay for courtroom technology expenses in 2007, "to offset some costs in [its] information technology program that would otherwise have to be funded with appropriated funds." (Pls.' Facts ¶ 18; 2d Skidgel Decl. Tab 35 (FY 2007–08 EPA Expenditures); *Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260*, 110th Cong. 51 (2008) (testimony of the chair of the Judicial Conference's Comm. on the Budget) ("[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds").)

In its fiscal year 2008 financial plan, the judiciary indicated that it intended to use EPA fees for Courtroom Technology ($24.8 million) and two new programs: a Jury Management System ("JMS") Web Page ($2.0 million) and a Violent Crime Control Act ("VCCA")

Notification. (2d Skidgel Decl. Tab 11 (FY 2008 Financial Plan at 11).) Actual expenditures for fiscal year 2008 included spending on those programs. (*Id.* Tab 35 (FY 2008 EPA Expenditures) ($24.7 million spent on Courtroom Technology; $1.5 million spent on the JMS Web Page; $1.1 million spent on the VCCA Notification).) Its fiscal year 2009 financial plan included a third new expense category: a CM/ECF state feasibility study ($1.4 million)—this was previously described in the 2007 financial plan as the State of Mississippi study, albeit not in the section related to EPA fee use. (*Id.* Tab 12 (FY 2009 Financial Plan at 45).) The judiciary also projected spending $25.8 million on Courtroom Technology; $200,000 on the JMS Public Web Page; and $1 million on VCCA Notification. (*Id.*) Again, actual expenditures for fiscal year 2009 included each of these programs. (*Id.* Tab 36 (FY 2009 EPA Expenditures) ($160,000 spent on the State of Mississippi study; $24.6 million spent on Courtroom Technology; $260,000 spent on Web-Based Juror Services (replacing line item for JMS); and $69,000 spent on VCCA Notification).)

In February 2009, Senator Lieberman, in his capacity as Chair of the Senate Committee on Homeland Security and Government Affairs, sent a letter to the Chair of the Judicial Conference Committee on Rules of Practice and Procedure, inquiring whether the judiciary was complying with the E-Government Act. (*See* Taylor Decl. Ex. H.) According to Senator Lieberman, the "goal of this provision . . . was to increase free public access to [court] records." (*Id.*) Given that PACER fees had increased since 2002, and that "the funds generated by these fees [were] still well higher than the cost of dissemination," he asked the Judicial Conference to "explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging 'to the extent necessary' for records using the PACER system." (*Id.*)

On behalf of the Judicial Conference and its Rules Committee, the Committee Chair and the Director of the AO responded that the judiciary was complying with the law because EPA fees are "used only to fund public access initiatives," such as "CM/ECF, the primary source of electronic information on PACER," and the "EBN system, which "provides access to bankruptcy case information to parties listed in the case by eliminating the production and mailing of traditional paper notices and associated postage costs, while speeding public service." (Taylor Decl. Ex. I ("3/26/2009 AO Letter").)

In March 2010, Senator Lieberman raised his concerns in a letter to the Senate Appropriations Committee. (*See* Taylor Decl. Ex. G.) In addition, he specifically questioned the use of EPA receipts for courtroom technology, acknowledging that the Appropriations Committees had approved this use in 2007, but expressing his opinion that this was "an initiative that [was] unrelated to providing public access via PACER and against the requirement of the E-Government Act." (*Id*. at 3.)

In 2011, the Judicial Conference, "[n]oting that . . . for the past three fiscal years the EPA program's obligations have exceeded its revenue," again amended the PACER fee schedule, raising the per-page cost from 8 to 10 cents. (Jud. Conf. Rep. at 16 (Sept. 13, 2011) (Skidgel Decl. Ex. N).) At the same time, it increased the fee waiver amount from $10 to $15 per quarter. (*Id*.)

3. 2010–2016[15]

From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected more than $920 million in PACER fees; the total amount collected annually increased

[15] These are the years that are relevant to the present litigation because there is a six-year statute of limitation on plaintiffs' claims.

from about $102.5 million in 2010 to $146.4 million in 2016.[16] (*See* Pls.' Facts ¶¶ 28, 46, 62, 80, 98, 116, 134; Taylor Decl. Ex. L; *see also* Attachment 1 hereto.[17])

During that time, PACER fees were used to pay for the costs of PACER, CM/ECF, EBN, the State of Mississippi study, Web-Based Juror Services, VCCA Notification, and Courtroom Technology. In its internal accounting, the judiciary divided these costs into Program Requirements and Congressional Priorities. (Taylor Decl. Ex. L.)

Under Program Requirements, there are five categories: (1) Public Access Services; (2) CM/ECF System; (3) Telecommunications (2010–11) or Communications Infrastructure, Services and Security (2012–16); (4) Court Allotments; and (5) EBN. (*Id.*) The Public Access Services category includes only expenses that relate directly to PACER. (*See* Taylor Decl. Ex. M, at 22-23 ("Def.'s Resp. to Pls.' Interrogs."); 3/23/18 Tr. at __.) From 2010 to 2016, the judiciary spent nearly $129.9 million on Public Access Services. (*Id.*) The next three categories, CM/ECF System, Telecommunications/Communications Infrastructure, and Court Allotments, include only expenses that relate to CM/ECF or PACER. (*See* 3/23/18 Tr. at __[18]; *see also* Def.'s Resp. to Pls.' Interrogs. at 22–26.) From 2010 to 2016, the judiciary spent $217.9 million on the CM/ECF System; $229.4 million on Telecommunications/ Communications Infrastructure; and $74.9 million on Court Allotments. (Taylor Decl. Ex. L (FY 2010-2016 EPA

---

[16] This number does not include print fee revenues, which are also collected pursuant to the EPA fee schedule.

[17] The document submitted to the Court as Exhibit L to the Taylor Declaration is defendant's internal accounting of PACER revenues and the use of PACER fees from FY 2010 through FY 2016. (*See* Taylor Decl. Ex. L; 3/23/18 Tr. at __.) While the contents of this document are described in this Memorandum Opinion, for the reader's benefit, an example of this internal accounting for the year 2010 is appended hereto as Attachment 1 in order to demonstrate how the judiciary has described and categorized the expenditures that were paid for by PACER fees.

[18] The official transcript from the March 23, 2018 motions hearing is not yet available. The Court will add page citations once it is.

Expenditures).) The final category, Electronic Bankruptcy Noticing, refers to the system which "produces and sends court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." (Def.'s Resp. to Pls.' Interrogs. at 10.) From 2010 to 2016, the judiciary spent a total of $73.3 million on EBN. (Taylor Decl. Ex. L.)

Under Congressional Priorities, there are four categories: (1) State of Mississippi; (2) VCCA Victim Notification; (3) Web-Based Juror Services; and (4) Courtroom Technology. (*Id.*) The State of Mississippi category refers to a study which "provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." (Def.'s Resp. to Pls.' Interrogs. at 5.) In 2010—the only year this category appears between 2010 and 2016—the judiciary spent a total of $120,988 for the State of Mississippi study. (Taylor Decl. Ex. L.) The next category is Victim Notification (Violent Crime Control Act), which refers to "[c]osts associated with the program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." (Def.'s Resp. to Pls.' Interrogs. at 5.) Via this program, "[l]aw enforcement officers receive electronic notification of court documents that were previously sent to them through the mail." (*Id.*) From 2010 to 2016, the judiciary spent $3.7 million on the VCCA victim notification program. The third category, Web-Based Juror Services, refers to "[c]osts associated with E-Juror software maintenance, escrow services, and scanner support." (*Id.* at 26.) "E-Juror provides prospective jurors with electronic copies of courts documents regarding jury service." (*Id.*) From 2010 to 2016, the judiciary spent $9.4 million on Web-Based Juror Services. (Taylor Decl. Ex. L.) Finally, the category labeled Courtroom Technology funds "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." (Def.'s Resp. to Pls.' Interrogs. at 26.) From 2010 to 2016, the judiciary spent

$185 million on courtroom technology. (Taylor Decl. Ex. L.)

II. PROCEDURAL HISTORY

On April 21, 2016, three national nonprofit organizations, National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice, on behalf of themselves and a nationwide class of similarly-situated PACER users, filed suit against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), claiming that the PACER fees charged by the Administrative Office of the United States Courts "exceeded the amount that could be lawfully charged, under the E-Government Act of 2002" and seeking "the return or refund of the excessive PACER fees." (Compl. ¶¶ 33–34.)

After denying defendant's motion to dismiss (*see* Mem. Op. & Order, Dec. 5, 2016, ECF Nos. 24, 25), the Court granted plaintiffs' motion for class certification (*see* Mem. Op. & Order, Jan. 24, 2017, ECF Nos. 32, 33). Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), the Court certified a class consisting of: "[a]ll individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities" and "certifie[d] one class claim: that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under the Little Tucker Act." (Order, Jan. 24, 2017, ECF No. 32.)

On August 28, 2017, plaintiffs filed a motion seeking "summary adjudication of the defendant's liability," while "reserving the damages determination for after formal discovery." (Pls.' Mot. at 1.) On November 17, 2017, defendant filed a cross-motion for summary judgment as to liability. The Court permitted the filing of three amicus briefs.[19] The cross-motions for

[19] Amicus briefs were filed by the Reporters Committee for Freedom of the Press, *et al.*, ECF No. 59, the American Association of Law Libraries, *et al.*, ECF No. 61, and Senator Joseph

summary judgment on liability are fully-briefed and a hearing on the motions was held on March 23, 2018.

ANALYSIS

The parties' cross-motions for summary judgment on liability present the following question of statutory interpretation: what restrictions does 28 U.S.C. § 1913 note place on the amount the judiciary may charge in PACER fees?

In relevant part, 28 U.S.C. § 1913 note reads:

> Court Fees for Electronic Access to Information
>
> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment.
>
> . . .
>
> The Director, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) . . . All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund . . . to reimburse expenses incurred in providing these services.

28 U.S.C. § 1913 note.

I. LEGAL STANDARD

Statutory interpretation "begins with the language of the statute." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). This means examining "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'" to determine if it has a "'plain and unambiguous meaning with regard to the particular dispute in the case.'" *United States v. Wilson*, 290 F.3d 347, 352–53 (D.C. Cir. 2002) (quoting *Robinson v.*

Lieberman and Congressman Darrell Issa, ECF No. 63.

Shell Oil Co., 519 U.S. 337, 340 (1997)); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (statutory interpretation "requires examination of the statute's text in light of context, structure, and related statutory provisions"). A statutory term that is neither a term of art nor statutorily defined is customarily "construe[d] . . . in accordance with its ordinary or natural meaning," frequently derived from the dictionary. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Where statutory language does not compel either side's interpretation, the Court may "look to the statute's legislative history to determine its plain meaning." *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133, 146 (D.D.C. 2015) (citing *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012)); *see also Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."). The fact that a statute can be read in more than one way does not demonstrate that it lacks "plain meaning." *United States v. Hite*, 896 F. Supp. 2d 17, 25 (D.D.C. 2012); *see, e.g.*, *Abbott v. United States,* 562 U.S. 8, 23 (2010).

A statute's legislative history includes its "statutory history," a comparison of the current statute to its predecessors and differences between their language and structure, *see, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231–32 (2007), along with relevant committee reports, hearings, or floor debates. In general, "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1289 n.26 (D.C. Cir. 1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980)). But even though, "[t]he view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996), in certain narrow circumstances, "'congressional

acquiescence to administrative interpretations of a statute'" may "inform the meaning of an earlier enacted statute." *U.S. Ass'n of Reptile Keepers*, 103 F. Supp. 3d at 153 & 154 n.7 (D.D.C. 2015) (quoting *O'Gilvie*, 519 U.S. at 90); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001)). Such a situation may be where Congress has amended the relevant provisions without making any other changes. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). However, "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978).

II. APPLICATION

Applying the "ordinary principles of statutory construction," the parties arrive at starkly different interpretations of this statute. Plaintiffs take the position that the statute "prohibits the AO from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER." (Pls.' Mot. at 12.) Under plaintiffs' interpretation, defendant's liability is established because with the exception of the category of expenditures labeled Public Access Services (*see* Attachment 1), most, if not all, of the other expenditures covered by PACER fees are not part of the "'marginal cost of disseminating records' through PACER." (*See* Pls.' Mot. at 17; *see also*, *e.g.*, Pls.' Facts ¶¶ 32, 34, 36, 38, 41, 43, 45 (fiscal year 2010).) Defendant readily admits that PACER fees are being used to cover expenses that are not part of the "marginal cost" of operating PACER (*see, e.g.*, Def.'s Resp. to Pls.' Facts ¶¶ 32, 34, 36, 38, 41, 43, 45), but it rejects plaintiffs' interpretation of the statute. Instead, defendant reads the statute broadly to mean that the Judicial Conference "may charge [PACER] fees in order to fund the dissemination of information through electronic means." (3/23/18 Tr. at __; *see also* Def.'s Mot. at 11 (Judicial Conference may "charge fees, as it deems necessary, for the provision of

information to the public through electronic means").) Under defendant's interpretation, it is not liable because "every single expenditure . . . [is] tied to disseminating information through electronic means." (3/23/18 Tr. at __.)

If the Court agreed with either proposed interpretation, the ultimate question of defendant's liability would be relatively straightforward. If PACER fees can only be spent to cover the "marginal cost" of operating PACER, defendant is liable most expenditures.[20] If PACER fees can be spent on any expenditure that involves "the dissemination of information through electronic means," defendant is not liable. But the Court rejects the parties' polar opposite views of the statute, and finds the defendant liable for certain costs that post-date the passage of the E-Government Act, even though these expenses involve dissemination of information via the Internet.

A. Does the E-Government Act Limit PACER Fees to the Marginal Cost of Operating PACER?

As noted, plaintiffs interpret the statute as prohibiting the AO "from charging more in

---

[20] The Court would still have to determine the meaning of "marginal cost" and whether any of the expenditures beyond those in the category of Public Access Services are part of that cost, since plaintiffs only expressly challenged "some" of the expenditures in several important categories, and defendant has only admitted that "some" of the expenditures in those categories are not part of the marginal cost. (*See, e.g.*, Pls.' Facts ¶¶ 41 (CM/ECF), 43 (Telecommunications), 45 (Court Allotments); Def.'s Resp. to Pls.' Facts ¶¶ 41, 43, 45.) The categories that plaintiffs argue should be examined as part of a determination of damages (as opposed to liability), since they may include PACER-related costs, are CM/ECF, Telecommunications/Communications Infrastructure, and Court Allotments. (Pls.' Mot. at 19; *see also* Attachment 1.)

Defendant, on the other hand, responds that even though only some of the costs associated with these categories involve PACER-related expenses, all of the expenses related to PACER and/or CM/ECF. (3/23/18 Tr. at __.)

However these costs are categorized, the Court rejects plaintiffs' suggestion that the issue is one to be decided as part of a determination of damages, for the issue as to liability necessarily requires a determination of whether these costs are proper expenditures under the E-Government Act.

PACER fees than is necessary to recoup the total marginal cost of operating PACER." (Pls.' Mot. at 12.) Plaintiffs concede, as they must, that this is not what the text of the statute actually says. But they argue that this is the best reading of the statutory language in light of its "plain language," its "history," and the need to "avoid[] two serious constitutional concerns that would be triggered by a broader reading." (*See* Pls.' Reply at 1.)

Plaintiffs first argue that it is clear from the text that the words "these services" in the last sentence of subparagraph (b), where it provides that the fees collected must be used "to reimburse expenses incurred in providing *these* services," include only the services that the AO is actually charging fees for as set forth in the EPA Fee Schedule, i.e., the PACER system, the PACER Service Center, and the provision of printed copies of documents "accessed electronically at a public terminal in a courthouse." (Pls.' Reply at 3–4; 3/23/18 Tr. at __.) The Court does not agree that the text dictates this constraint. The term "these services" could also mean any service that provides "access to information available through automatic data processing equipment," whether or not it is expressly part of the EPA fee schedule.

Plaintiffs' next argument is based on the legislative history of the 2002 amendment, which consists of the following single paragraph in a Senate Committee Report:

> The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

2002 S. Rep. at 23. Plaintiffs argue that this paragraph "makes clear that Congress added this language because it sought to prevent the AO from 'charg[ing] fees that are higher than the marginal cost of disseminating the information,'" as it had been doing for several years, and that

"although the E-Government Act does not refer to PACER by name, Congress clearly had PACER in mind when it passed the Act." (Pls.' Mot. at 11 (quoting 2002 S. Rep. at 23).)

The Court finds this argument unconvincing for several reasons. First, there is no mention in the statute of PACER or its "marginal cost," and in the 2002 Senate Report, the reference to PACER and "marginal cost" follows the words "For example," suggesting that the amendment was not intended to apply only to PACER. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990) ("[T]he language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history."). And, in fact, the 2002 Senate Report recognizes that PACER is only a subset of a larger system when it stated: "[t]he Committee intends to encourage the Judicial Conference to move from a structure in which *electronic docketing systems* are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." 2002 S. Rep. at 23 (emphasis added). The use of the phrase "electronic docketing systems" appears to envision more than just PACER, and to at least encompass CM/ECF, given that it, unlike PACER, is an electronic docketing system.

Second, a single committee's report reflects only what the committee members might have agreed to, not the "intent" of Congress in passing the law. As the Supreme Court observed, "[u]nenacted approvals, beliefs, and desires are not laws." *P.R. Dep't of Consumer Affairs v. Isla Petrol. Corp.*, 485 U.S. 495, 501 (1988). As the Supreme Court observed in rejecting reliance on "excerpts" said to reflect congressional intent to preempt state law, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." *Id.*

Perhaps most tellingly, the E-Government Act changed only one phrase in the first

sentence of the first paragraph—replacing "shall hereafter" with "may, only to the extent necessary." It did not alter the third sentence of paragraph (b), which is the part of the statute that governs what expenses can be reimbursed by PACER fees. Thus, even though the 2002 Senate Report correctly observes that PACER fees exceeded the marginal cost of operating PACER, the amendment to the statute did not address which services could be reimbursed, but only the amount of fees for services that could be charged. In addition, at the time the E-Government Act was passed, CM/ECF had been in operation for at least four years, PACER fees were already being used to pay for non-PACER costs, such as EBN and CM/ECF (*see* 2d Skidgel Decl. Tabs 30–32), and there is nothing in the statute's text or legislative history to suggest that Congress intended to disallow the use of PACER fees for those services. In the end, a single sentence in a committee report, which has been taken out of context, is not enough to persuade the Court that Congress intended the E-Government Act to impose a specific limitation on the judiciary's collection and use of EPA fees to the operation of only PACER.

Plaintiffs also point to "[p]ost-enactment history"—the letters from the E-Government Act's sponsor, Senator Joseph Lieberman, in 2009 and 2010. (Pls.' Mot. at 11–12 ("The Act's sponsor has repeatedly expressed his view, in correspondence with the AO's Director, that the law permits the AO to charge fees 'only to recover the direct cost of distributing documents via PACER,' and that the AO is violating the Act by charging more in PACER fees than is necessary for providing access to 'records using the PACER system.'").) But, as plaintiffs essentially conceded during the motions hearing, the post-enactment statements of a single legislator carry no legal weight when it comes to discerning the meaning of a statute. (3/23/18 Tr. at __); *see Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J. concurring) ("the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a

judge concerning a statute not yet passed"); *see also Consumer Prod. Safety Comm'n*, 447 U.S. at 117–18 ("even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

Plaintiffs' final argument is that the "constitutional doubt" canon of construction requires their interpretation because any other interpretation would raise a question as to whether Congress had unconstitutionally delegated its taxing authority because the statute does not clearly state its intention to do so. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989) ("Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."). Assuming *arguendo* that this doctrine applies with equal force to unregulated parties, an issue not addressed by the parties, the Court does not find plaintiffs' argument persuasive. First, this canon of construction has a role only where the statute is ambiguous, which, as explained herein, the Court concludes is not the case. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). Second, the canon can only be applied where there is a "reasonable alternative interpretation," *Gomez v. United States*, 490 U.S. 858, 864 (1989), but the Court has already explained that it does not find plaintiffs' proposed interpretation to be a reasonable alternative interpretation. Finally, as will be discussed in Section C, *infra*, the Court finds that the statute does clearly state that the judiciary has the authority to use its PACER fees for services that may not directly benefit a particular PACER user. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153–54 (2013) ("This is not to say that Congress must incant magic words in order to speak

clearly. We consider context . . . as probative of [Congress' intent].").

For these reasons, the Court will not adopt plaintiffs' interpretation of the statute as limiting PACER fees to the total marginal cost of operating PACER.

B. Does the E-Government Act Allow PACER Fees to Fund Any "Dissemination of Information Through Electronic Means"?

Defendant's interpretation of the statute embraces the other extreme, positing that the statute allows PACER fees to be used for any expenditure that is related to "disseminating information through electronic means." (3/23/18 Tr. at __; *see* Def.'s Mot. at 11.) It is not entirely clear to the Court how the defendant arrived at this definition. Most of the reasons defendant gives to justify its interpretation are really just arguments against plaintiffs' interpretation, such as (1) the authority to charge EPA fees and use them to reimburse "services" predated the E-Government Act and that language was not changed by the Act; (2) there is no mention of PACER or "marginal cost" in the 2002 amendment; and (3) the legislative history discussed PACER only as an "example." As for defendant's affirmative arguments, addressed below, none demonstrates that defendant's conclusion is correct.

Defendant's first argument is based on the fact that the text of the statute requires that EPA fees be deposited in the JITF, which is the fund that the judiciary is allowed to use for "broad range of information technology expenditures." (Def.'s Mot. at 10.) According to defendant, the fact that EPA fees are deposited in this fund "informs how Congress intended the fees received from PACER access to be spent." (*Id.*) However, while the statute provides that PACER fees are to be deposited in the JITF, it also directs that they are to be used to "reimburse expenses incurred" in providing "access to information available through data processing equipment." That statutory language cannot be ignored as defendant attempts to do. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous, void or insignificant."). Notably, it is clear that the judiciary has never treated its EPA fees in the JITF as fungible with the rest of the money in the JAF. (*See* FY 2006 JITF Annual Report; FY 2007 Financial Plan; 3/26/2009 AO Letter at 3-4 ("While fee collections from the EPA program are also deposited into the JITF, they are used only to fund electronic public access initiatives and account for only a small portion of its balance.").)

Defendant's main argument is that its interpretation of the statute has been accepted by Congress because the Appropriations Committees, either explicitly or implicitly, endorsed, mandated, or approved every request pertaining to the use of EPA fees. For example, defendant points out that the 1996 House Report stated that the Committee "expect[ed] available balances from public access fees" to be used for electronic bankruptcy noticing and electronic case filing, 1996 H.R. Rep. at 89; the 2003 House and Senate Committee Reports "expressly directed the AO to use PACER fees to update the CM/ECF system," 2003 H.R. Rep. at 116; 2003 S. Rep. at 118; those same Committees endorsed the Judiciary's FY 2007 Financial Plan, which set forth the AO's plan "to use receipts from PACER fees to fund courtroom technology and to perform infrastructure maintenance consistent with Congressional actions" (FY 2007 Financial Plan at 45; FY 2007 Senate Approval Letter; FY 2007 House Approval Letter); and the 2006 Senate Report, which urged the judiciary to undertake a study about the feasibility of sharing CM/ECF technology with states, *see* 2006 S. Rep. at 176, which the judiciary then did via its State of Mississippi study (FY 2009 EPA Expenditures). (*See* Def.'s Mot. at 17–18.) More generally, and applicable at least as to the expenditures that post-date the passage of the E-Government Act, congressional approval is reflected by the fact that after the judiciary submitted its proposed budget to Congress and Congress appropriated money to the judiciary, the judiciary was then

required to submit its proposed financial plan, which included its intended use of EPA fees, to the House and Senate Appropriations Committees for approval. (Def.'s Reply at 3; 3/23/18 Tr. at__.) Looking at this entire process as a "totality," defendant argues, establishes that by implicitly approving certain expenditures, Congress agreed with the Judicial Conference's interpretation of the statute. (3/23/18 Tr. at __ ("[W]e have 26 years where the only legislative history that has gone to the judicial conference, but for Senator Lieberman's letter, says the judicial conference's interpretation is correct. The judicial conference's interpretation of that language that PACER fees may be used more broadly is correct.").)

For a number of reasons, defendant's argument is flawed. First, the record does not reflect meaningful congressional approval of each category of expenditures. Each so-called "approval" came from congressional committees, which is not the same as approval by Congress "as a whole." *See Tenn. Valley Auth.*, 437 U.S. at 192.[21] Moreover, the Court questions whether it is even possible to infer approval of a specific expenditure based solely on committee-approval of the judiciary's financial plans, where the record does not show any particular attention was paid to this itemization of intended uses of EPA fees. For almost of all the years for which defendant has included copies of approvals, the "approvals" consist of a mere line in an email or letter that indicates, without any elaboration or specification, that the Appropriations Committee has "no objection."[22] (*See, e.g.*, 2d Skidgel Decl. Tab 16 (2010); *see also id*. Tabs 15, 17, 20–27

[21] Despite having the opportunity to respond to the holding of *Tennessee Valley Authority v. Hill*, defendant has failed to cite any legal support for its use of approvals by the Committee on Appropriations.

[22] The one exception was courtroom technology. In response to the judiciary's request in its FY 2007 Financial Plan to use PACER fees for Courtroom Technology, the Chairman and Ranking Member of the Subcommittee on Financial Services and General Government wrote on May 2, 2007: "We have reviewed the information included and have no objection to the financial plan including . . . the expanded use of Electronic Public Access Receipts." (2007 Senate Approval Lettter; *see also id*. 2007 House Approval Letter.)

(2011, 2013–2016).) In 2009 and 2012, there are letters from the Appropriations Committees which reflect a closer analysis of some parts of the financial plan, but neither mentions the judiciary's planned uses of PACER fees. (*Id*. Tabs 14, 18–19.) By contrast, in July 2013, the AO sent an email to the Senate Appropriation Committee at 1:02 p.m. noting that "[i]n looking through our records we don't seem to have approval of our FY 2013 financial plan. Would you be able to send us an email or something approving the plan? The auditors ask for it so we like to have the House and Senate approvals on file." (2d Skidgel Decl. Tab 20.) Less than an hour later, at 1:47 p.m., an email came from a staff member on the Senate Appropriations Committee stating "Sorry about that and thanks for the reminder. We have no objection." (*Id*.)

Second, even if the record established approval of the various uses of EPA fees, there is nothing to support the leap from approval of specific expenditures to defendant's contention that the Appropriations Committees were cognizant and approved of the Judicial Conference's "interpretation." (*See* 3/23/18 Tr. at __). In fact, the AO never used the definition defendant now urges the Court to adopt—the "dissemination of information through electronic means"—to explain its use of EPA fees for more than PACER. Rather, it used terms like "public access initiatives" to describe these expenditures. (*See* FY 2007 Financial Plan ("collections are used to fund information technology initiatives in the judiciary related to public access"); 2d Skidgel Decl. Tab 12 (FY 2009 Financial Plan at 45) (EPA revenues "are used to fund IT projects related to public access"); Taylor Decl. Ex. J at 10 (AO document, entitled Electronic Public Access Program Summary, December 2012, stating that EPA revenue "is dedicated solely to promoting and enhancing public access").)

Finally, as defendant acknowledges, the post-enactment action of an appropriations committee cannot alter the meaning of the statute, which is what controls what expenditures are

permissible. *See Tenn. Valley Auth.*, 437 U.S. at 191 ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.").[23] Thus, the fact that appropriations committees expressly or implicitly endorsed the use of EPA fees for certain expenditures cannot establish that those expenditures are permissible uses of EPA fees.

For these reasons, the Court is not persuaded that the statute permits the collection of EPA fees to fund any expense that involves the "dissemination of information through electronic means."

C. What Limitation Did the E-Government Act Place on the Use of PACER Fees?

Having rejected the parties' diametrically opposed interpretations, the Court must embark on its own analysis to determine whether defendant's use of PACER fees between 2010 and 2016 violated the E-Government Act. The Court concludes that defendant properly used PACER fees to pay for CM/ECF[24] and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most of the expenditures for Courtroom

---

[23] Even an appropriations Act passed by Congress cannot alter the meaning of statute. *See Tenn. Valley Auth.*, 437 U.S. at 190–91 ("We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. [This] would lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation . . . .").

[24] It is undisputed that the expenses in the categories now labeled CM/ECF, Court Allotments and Telecommunication/Communications Infrastructure include only expenses that are directly related to PACER or CM/ECF. (*See* 3/23/18 Tr. at __; *see also* Skidgel Decl. ¶ 19 ("through court allotments, "courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server)" and "[f]unding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors"; Def.'s Resp. to Pls.' Interrogs. at 22–26.)

Technology. (*See* Attachment 1.)

The statutory language in 28 U.S.C. § 1913 note is clear that, to be paid for with PACER fees, a "service" must be one that provides the public with "access to information available through automatic data processing equipment." An examination of this statutory provision's history—dating from its enactment in 1990 and culminating in its amendment by the E-Government Act in 2002—resolves any ambiguity in its meaning and allows the Court to determine which expenditures between 2010 and 2016 were properly funded by PACER fees.

When the 28 U.S.C. § 1913 note was first enacted in 1989, s*ee* Pub. L. 101-515, § 404, PACER was in its infancy, but it was operational, and the statute clearly applied to it. (*See* Jud. Conf. Rep. at 83 (Sept. 14, 1988); EPA Chronology at 1; Jud. Conf. Rep. at 19 (Mar. 14, 1989); Jud. Conf. Rep. at 21 (Mar. 13, 1990); 1990 S. Rep. at 86.) Yet, there was no mention of PACER in the statute, nor was there any suggestion that the judiciary was precluded from recouping expenses beyond the cost of operating PACER. In fact, it is apparent that Congress recognized the possibility that fees would cover the costs of making court records available to the public electronically. *See* 1990 S. Rep. at 86 ("language . . . authorizes the Judicial Conference to prescribe reasonable fees for public access to case information, to reimburse the courts for automating the collection of the information"); *see also* 1992 H.R. Rep. at 58 (noting that "the Judiciary's investments in automation have resulted in enhanced service to the public and to other Government agencies in making court records relating to litigation available by electronic media" and "request[ing] that the Judiciary equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so").

The first federal court experiment with electronic case filing began in the Northern

District of Ohio in 1996. (1997 AO Paper at 4.) Later that year, both the House and Senate Appropriations Committees made clear that they expected the judiciary to use its EPA fee collections for more than just paying for the cost of PACER. (1996 H.R. Rep. at 89 ("The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as *electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing*.") (emphasis added); 1996 S. Rep. at 88 ("The Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.").)

While these statements in the reports of the Committee on Appropriations predated the passage of the E-Government Act, they are not dispositive in terms of discerning what Congress intended the statute to mean. They are part of a bigger picture and an important backdrop to the passage of the E-Government Act. Contemporaneously with Congress's prompting the judiciary to use EPA fees to pay for public access to electronically-stored case documents "[t]he transition towards electronic case files ("ECF") in the federal courts [wa]s underway" by March 1997. (1997 AO Paper at v.) Over the next few years, relying expressly on the 1996 House and Senate Reports relating to fiscal year 1997 appropriations, the judiciary began using EPA fees to fund the development of a national case management and electronic case filing system, CM/ECF,

which would allow federal courts to maintain complete electronic files. (*See, e.g.*, FY 2002 Budget Request ("Fiscal year 1997 appropriations report language expanded the Judiciary's authority to use these funds to finance automation enhancements that improve the availability of electronic information to the public.").) The judiciary anticipated that CM/ECF would "produce an impressive range of benefits . . . including . . . public access to case file information." (1997 AO Paper at v.) For instance, in 1998, the Judicial Conference created a web interface for PACER and added a per page fee for accessing case dockets and electronic filings via the Internet. (Jud. Conf. Rep. at 64–65 (Sept. 15, 1998); EPA Chronology at 1.) At that time, the Judicial Conference noted in its report that

> The revenue from these fees is used exclusively to fund the full range of electronic public access (EPA) services. With the introduction of Internet technology to the judiciary's current public access program, the Committee on Court Administration and Case Management recommended that a new Internet PACER fee be established to maintain the current public access revenue *while introducing new technologies to expand public accessibility to PACER information*.

(Jud. Conf. Rep. at 64–65 (Sept. 15, 1998) (emphasis added).) By no later than fiscal year 2000, the judiciary was spending substantial sums of money, derived from EPA fees, on CM/ECF and EBN. (2d Skidgel Decl. Tab 30 (FY 2000 EPA Expenditures).) In fact, over $10 million was spent on case management/electronic case files, infrastructure and electronic bankruptcy noticing in 2000. (*Id.*)

Then in 2002, Congress passed the E-Government Act. This Act encompassed far more than § 205(e)'s limitation on the charging of fees. The overall purpose of the section pertaining to the judiciary was to "require federal courts to provide greater access to judicial information over the Internet." 2002 S. Rep. at 23. To that end, the Act mandated that the judiciary expand the public's access to electronically stored information that was accessible via PACER:

- § 205(a), "Individual Court Websites," "require[d] the Supreme Court, each circuit court,

each district court, and each bankruptcy court of a district to establish a website that would include public information such as location and contact information for courthouses, local rules and standing orders of the court, docket information for each case, and access to written opinions issued by the court, in a text searchable format." 2002 S. Rep. at 22.

- § 205(b), "Maintenance of Data Online," required that "[t]he information and rules on each website . . . be updated regularly and kept reasonably current."

- § 205(c), "Electronic Filings," required, subject to certain specified exceptions, that courts provide public access to all electronically filed documents and all documents filed in paper that the court converts to electronic form.

  and

- § 205(d), "Dockets with Links to Documents," directed the Judicial Conference to "explore the feasibility of technology to post online dockets with links allowing all filing, decision, and rulings in each case to be obtained from the docket sheet of that case."

Subsection 205(e), entitled "Cost of Providing Electronic Docketing Information," changed the language that required the judiciary to charge fees ("shall, hereafter") to make its decision to charge fees discretionary and to limit those fees "to the extent necessary." Even though the judiciary was already using EPA fees to pay for the costs of CM/ECF and EBN, no changes were made to the last sentence of subparagraph (b), which defined the scope of services that can be reimbursed with EPA fees.

As is clear from the E-Government Act, Congress intended in 2002 for the judiciary to expand its capability to provide access to court information, including public information relating to the specific court and docket information for each case, including filings and court opinions. With certain exceptions, documents filed electronically were to be made available publicly, and the judiciary was to explore the possibility of providing access to the underlying contents of the docket sheets through links to filings, decisions and rulings. This ambitious program of providing an electronic document case management system was mandated by Congress, although no funds were appropriated for these existing and future services, but

Congress did provide that fees could be charged even though the fees could be "only to the extent necessary."

Consistent with this view the Appropriations Committees reiterated their support for allowing EPA fees to be spent on CM/ECF in 2003. 2003 H.R. Rep. at 116; 2003 S. Rep. at 118; 2003 Conf. Rep. at H12515.

Although congressional "acquiescence" as an interpretative tool is to be viewed with caution, the Court is persuaded that when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of EPA fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and EBN. Accordingly, the Court concludes that the E-Government Act allows the judiciary to use EPA fees to pay for the categories of expenses listed under Program Requirements: CM/ECF, EBN, Court Allotments and Telecommunications/Communications Infrastructure.[25] (*See* Attachment 1.)

However, Congress' endorsement of the expenditures being made in 2002, in conjunction with the statutory language, the evolution of the E-Government Act, and the judiciary's practices as of the date of the Act's passage, leads the Court to conclude that the E-Government Act and its predecessor statute imposed a limitation on the use of PACER fees to expenses incurred in providing services, such as CM/ECF and EBN, that are part of providing the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system. This interpretation recognizes that PACER cannot be divorced from CM/ECF, since

[25] Plaintiffs' recent supplemental filing after the motions hearing suggested for the first time that the CM/ECF category might require closer examination to determine whether the expenditures therein, in particular CM/ECF NextGen, were all appropriately treated as "public access services." (*See* Pls.' Resp. to Def.'s Supp. Authority at 3, ECF No. 85.) But plaintiffs made no such argument in response to defendant's motion for summary judgment. (*See* Pls.' Reply at 6 (raising no challenge to CM/ECF if the statute authorizes "PACER fees to cover all costs necessary for providing PACER access and other public access services").)

PACER is merely the portal to the millions of electronically-filed documents that are housed by the judiciary on CM/ECF and are available to the public via the Internet only because of CM/ECF.

With this understanding, the Court will consider whether the judiciary properly used PACER fees for the remaining categories of expenses, which the judiciary now identifies as Congressional Priorities: Courtroom Technology, the State of Mississippi study, Web-Juror, and VCCA. (*See* Attachment 1.)

The judiciary only began using EPA fees for these expenses five or more years after the E-Government Act. Defendant's first attempt to justify the use of EPA fees for each of these categories focused almost exclusively on purported congressional approvals. As previously discussed, post-enactment legislative history as a general rule is of limited use in statutory interpretation, particularly when the action comes from a committee—especially an appropriations committee—rather than Congress as a whole. Compounding that problem here, also as previously noted (with the exception of courtroom technology, *see* supra note 22), is the questionable substance of the congressional approvals for several of these expenditures with the exception of courtroom technology.

Even if defendant could rely on congressional approvals, the Court would still have to decide whether the expenses fit within the definition of permissible expenses.

State of Mississippi: The category labeled "State of Mississippi" is described by defendant as a study that "provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." (Def.'s Resp. to Pls.' Interrogs. at 5.) It is apparent from this description that this study was not a permissible expenditure since it was unrelated to providing access to electronic

information on the federal courts' CM/ECF docketing system.

VCCA: The category labeled Victim Notification (Violent Crime Control Act) refers to "[c]osts associated with the program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." (Def.'s Resp. to Pls.' Interrogs. at 11.) Via this program, "[l]aw enforcement officers receive electronic notification of court documents that were previously sent to the through the mail." (*Id.*) Defendant first defended the use of EPA fees to pay for this program on the ground that it "improves the overall quality of electronic service to the public via an enhanced use of the Internet." (Def.'s Resp. to Pls.' Facts ¶¶ 34, 53, 69, 87, 105, 123, 141.) Defendant has also argued that this program benefits the public because by sharing this information electronically, the information gets to law enforcement agencies more quickly, and they in turn may be able to revoke supervision, if warranted, more quickly. (*See* 3/23/18 Tr. at __.) But neither of these justifications establishes that VCCA is a permissible expenditure of PACER funds. While this program disseminates federal criminal case information, and its outcome may indirectly have some benefit to the public, it does not give the public access to any electronically stored CM/ECF information.

Web-Juror: The category labeled Web-Based Juror Services refers to the costs associated with E-Juror, a juror management system. (Def.'s Resp. to Pls.' Interrogs. at 11.) It "provides prospective jurors with electronic copies of court documents regarding jury service." (*Id.*) Defendant's justification for using EPA fees to pay for these costs is that the E-Juror program "improves the overall quality of electronic service to the public via an enhanced use of the Internet." (Def.'s Resp. to Pls.' Facts ¶¶ 71, 89, 107, 125, 143.) Again, whether a program "improves the overall quality of electronic service to the public via an enhanced use of the Internet" does not establish that it is permissible use of EPA fees where there is no nexus to the

public's ability to access information on the federal court's CM/ECF docketing system.

Courtroom Technology: The category labeled "Courtroom Technology" funds "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." (Def.'s Resp. to Pls.' Interrogs. at 11.) The expenses in this category include "the costs of repairs and maintenance for end user IT equipment in the courtroom; obligations incurred for the acquisition and replacement of digital audio recording equipment in the courtroom; costs for audio equipment in the courtroom, including purchase, design, wiring and installation; and costs for video equipment in the courtroom, including purchase, design, wiring and installation." (Def.'s Resp. to Pls.' Interrogs. at 32.) Defendant argues that EPA fees are appropriately used for courtroom technology because "it improves the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically through electronic public access services when it is presented electronically and becomes an electronic court record." (FY 2007 Financial Report at 46.) Again, there is a lack of nexus with PACER or CM/ECF. From the existing record, it would appear that the only courtroom technology expenditure that might be a permissible use of EPA fees is the "digital audio equipment" that allows digital audio recordings to be made during court proceedings and then made part of the electronic docket accessible through PACER. (*See* Taylor Decl. Ex. A (2013 EPA Fee Schedule) (charging $2.40 "for electronic access to an audio file of a court hearing via PACER").) But, the Court does not see how flat-screen TVs for jurors or those seated in the courtroom, which are used to display exhibits or other evidence during a court proceeding, fall within the statute as they do not provide the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system.

Accordingly, with the exception of expenses related to digital audio equipment that is

used to create electronic court records that are publicly accessible via PACER, the Court concludes that the expenses in the categories listed as Congressional Priorities are not a permissible use of EPA fees.[26]

CONCLUSION

For the reasons stated above, the Court will deny plaintiffs' motion for summary judgment as to liability and will grant in part and deny in part defendant's cross-motion for summary judgment as to liability. A separate Order, ECF No. 88, accompanies this Memorandum Opinion.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: March 31, 2018

[26] The Court urges the parties to confer prior to the next status conference to determine for the years 2010 to 2016 the amount of courtroom technology expenditures that cannot be paid with PACER fees.

Public Access and Records Management Division

AVAILABLE RESOURCES:

Summary of Resources QTRLY Rprt

			FY 2010 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$	34,381,874
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$	102,511,199
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$	516,534
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$	187,118
5	**Total Available Resources**	**$**	**137,596,725**
6	***PROGRAM REQUIREMENTS:***		
7	**Public Access Services and Applications**		
8	EPA Program (OXEEPAX)	$	18,768,552
9	EPA Technology Infrastructure & Applications (OXEPTAX)	$	-
10	EPA Replication (OXEPARX)	$	-
11	**Public Access Services and Applications**	**$**	**18,768,552**
12	**Case Management/Electronic Case Files System**		
13	Development and Implementation (OXEECFP)	$	3,695,078
14	Operations and Maintenance (OXEECFO)	$	15,536,212
15	CM/ECF Futures (OXECMFD)	$	3,211,403
16	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$	144,749
17	District Operational Forum (OXEDCAX)	$	674,729
18	Bankruptcy Operational Forum (OXEBCAX)	$	492,912
19	**Subtotal, Case Management/Electronic Case Files System**	**$**	**23,755,083**
20	**Electronic Bankruptcy Noticing:**		
21	Electronic Bankruptcy Noticing (OXEBNCO)	$	9,662,400
22	**Subtotal, Electronic Bankruptcy Noticing**	**$**	**9,662,400**
23	**Telecommunications (PACER-Net & DCN)**		
24	PACER-Net (OXENETV)	$	10,337,076
25	DCN and Security Services (OXENETV)	$	13,847,748
26	PACER-Net & DCN (OXDPANV)	$	-

27	Security Services (OXDSECV)	$	-
28	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$**	**24,184,824**
29	**Court Allotments**		
30	Court Staffing Additives(OXEEPAA)	$	228,373
31	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$	1,291,335
32	CM/ECF Court Allotments (OXEECFA)	$	7,605,585
33	Courts/AO Exchange Program (OXEXCEX)	$	303,527
34	**Subtotal, Court Allotments**	**$**	**9,428,820**
35	**Total Program Requirements**	**$**	**85,799,679**
36	***Congressional Priorities:***		
37	**Victim Notification (Violent Crime Control Act)**		
38	Violent Crime Control Act Notification (OXJVCCD & OXJVCCO)	$	332,876
39	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**332,876**
40	**Web-based Juror Services**		
41	Web Based E-Juror Services O&M (OXEJMEO)	$	-
42	**Subtotal, Web-based Juror Services**	**$**	**-**
43	**Courtroom Technology (OXHCRTO-3000)**		
44	Courtroom Technology (OXHCRTO-3000)	$	24,731,665
45	**Subtotal, Courtroom Technology Program**	**$**	**24,731,665**
46	**State of Mississippi (OXEMSPX)**		
47	State of Mississippi (OXEMSPX)	$	120,988
48	**Subtotal, Mississippi State Courts**	**$**	**120,988**
49	**Total Congressional Priorities**	**$**	**25,185,529**
50	**Total Program & Congressional Priorities**	$	110,985,208
51	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**26,611,517**
52	PACER FEE (OXEEPAC) Carry Forward	$	26,051,473
53	PRINT FEE (OXEEPAP) Carry Forward	$	-
54	**Total EPA Carry Forward**	**$**	**26,051,473**
55	Total Print Fee Revenue	$	703,652
56	Disbursed in (OXEEPAA) Allotments	$	143,608
57	PRINT FEE (OXEEPAP) Carry Forward	$	560,044

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

ORDER

Before the Court is defendant's Motion to Certify the Court's Orders of December 5, 2016, and March 31, 2018 for Interlocutory Appeal and to Stay Proceedings Pending Appeal (ECF No. 99). Plaintiffs advised the Court during a status conference on July 18, 2018, that they opposed certification of the December 5, 2016 Order, but otherwise consented to defendant's motion. Upon consideration of the motion, plaintiffs' partial consent thereto, and the entire record herein, and for the reasons stated in open court on July 18, 2018, and in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendant's motion is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) For the reasons stated in open court on July 18, 2018, the motion is **DENIED** as to the December 5, 2016 Order (ECF No. 24).

(2) For the reasons stated in an accompanying Memorandum Opinion, ECF No. 105, the motion is **GRANTED** as to the Court's Order of March 31, 2018 (ECF No. 88).

(3) The motion to stay further proceedings pending appeal is **GRANTED** and all proceedings in this matter are hereby **STAYED** pending further order from this Court.

It is further **ORDERED** that the Court's Order of March 31, 2018 (ECF No. 88) is **AMENDED** to add the following statement:

> It is further **ORDERED** that this Order is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because it involves "a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A separate Memorandum Opinion issued today sets out in greater detail the basis for the Court's decision to certify this Order.

SO ORDERED.

Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

MEMORANDUM OPINION

The Court issues this Memorandum Opinion in further support of its Order granting defendant's Motion to Certify the Court's Order of March 31, 2018 for Interlocutory Appeal. (*See* Order, ECF No. 104; Defs.' Mot. to Certify, ECF No. 99; March 31, 2018 Order, ECF No 88.)

BACKGROUND

This case concerns the lawfulness of the fees charged by the federal judiciary for the use of its Public Access to Court Electronic Records (PACER) system. Plaintiffs are PACER users who contend that the fees charged from 2010 to 2016 exceeded the amount allowed by federal law, *see* 28 U.S.C. § 1913 note (enacted as § 404 of the Judiciary Appropriations Act, 1991, Pub. L. 101-515, 104 Stat. 2101 (Nov. 5, 1990) and amended by § 205(e) of the E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (Dec. 17, 2002)). They brought suit under the Little Tucker Act, seeking monetary relief from the excessive fees.

On December 5, 2016, the Court denied defendants' motion to dismiss (*see* Order, ECF

No. 24), and, on January 24, 2017, it granted plaintiffs' motion for class certification (*see* Order, ECF No. 32). Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), the Court certified a class consisting of:

> All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.

The parties then filed cross-motions for summary judgment on liability, which, they agreed, depended on a single and novel question of statutory interpretation: "what restrictions does 28 U.S.C. § 1913 note place on the amount the judiciary may charge in PACER fees?" *Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 138 (D.D.C. 2018). The parties advocated for starkly different interpretations of the statute, *id*. at 139-40, neither of which the Court found persuasive. In the end, it arrived at its own interpretation, which led to the denial of plaintiffs' motion and the granting in part and denying in part of defendant's motion. (*See* Order, ECF No. 89.)

At the first status conference after deciding the cross-motions for summary judgment, the Court asked the parties to consider whether the March 31, 2018 Order should be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), given the fact that the exact determination of damages would likely require a lengthy period of fact and expert discovery, additional summary judgment briefing and potentially a bench trial. (*See* Tr., Apr. 18, 2018, at 5, 6, 13, 20; *see also* Joint Status Report Proposing a Schedule to Govern Further Proceedings, ECF No. 91 (proposing an additional five months of fact discovery, then five months for expert discovery, to be followed by summary judgment briefing or a bench trial).) Plaintiffs readily agreed that certification would be appropriate and desirable. (*Id*. at 21.) The government indicated that it needed additional time to respond in order to seek the necessary approval from the Solicitor

General. (*Id*. at 20.)

On July 13, 2018, the parties filed a joint status report advising the Court that "the Solicitor General has authorized interlocutory appeal in this case." (Joint Status Report at 2, ECF No. 98.) That same day, defendant filed the pending motion to certify the March 31, 2018 Order.[1] At the status conference on July 18, 2018, and in their written response filed on July 27, 2018, plaintiffs noted their continued belief that the March 2018 Order should be certified. (*See* Pls.' Resp., ECF No. 102.)

ANALYSIS

A district judge may certify a non-final order for appeal if it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). The decision whether to certify a case for interlocutory appeal is within the discretion of the district court. *In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 761 (D.C. Cir. 2014). If the district court finds that each requirement is met, it "shall so state in writing in such order," and the party seeking to appeal must then file an application with the Court of Appeals "within ten days after the entry of the order." 28 U.S.C. § 1292(b).

Although the statute does not expressly require the Court to do anything more than state that each of these requirements is met in the order itself, the general rule is that "[a] district court order certifying a § 1292(b) appeal should state the reasons that warrant appeal," and "a

[1] Defendants' motion also sought certification of the December 5, 2016 Order denying their motion to dismiss. The Court explained in open court during the status conference on July 18, 2018, why it would not certify that Order, but noted that defendant was free to raise a challenge to the Court's subject matter jurisdiction at any time. (*See* Tr., July 18, 2018.)

thoroughly defective attempt may be found inadequate to support appeal." 16 Wright & Miller, Federal Practice & Procedure § 3929 (3d ed. 2008). Accordingly, the Court sets forth herein the basis for its conclusion that the March 31, 2018 Order satisfies each of the three requirements of § 1292(b).

1. Controlling Question of Law

The first requirement for § 1292(b) certification is that the order involve a "controlling question of law." "[A] 'controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources.'" *APCC Servs. v. Sprint Communs. Co*., 297 F. Supp. 2d 90, 95–96 (D.D.C. 2003) (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). The March 31, 2018 Order involves a controlling question of law under either prong.

The parties' cross-motions for summary judgment presented the Court with a pure legal issue -- the proper interpretation of 28 U.S.C. § 1913 note. That statute provides, in relevant part:

> The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph as a charge for services rendered shall be deposited as offsetting

> collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Plaintiffs took the position that the statute prohibits the government from charging more in PACER fees "than is necessary to recoup the total marginal cost of operating PACER,'" and that the government is liable for fees it has charged in excess of this amount. *Nat'l Veterans Legal Servs. Program*, 291 F. Supp. 3d at 139. The government "readily admit[ted] that PACER fees are being used to cover expenses that are not part of the 'marginal cost' of operating PACER," but countered that the statute allows the government to "charge [PACER] fees in order to fund the dissemination of information through electronic means," which was exactly what it had done. *Id.* at 140. The Court adopted neither view, concluding the statute did not preclude the use of PACER fees to cover certain expenses beyond the marginal cost of operating PACER, but that certain uses of PACER fees were impermissible. *Id*. at 140-150. Thus, if the Court's interpretation is incorrect, the March 31, 2018 Order would require reversal – one of the prongs of the definition of a "controlling question of law."

In addition, regardless of which of these three interpretations of the statute is correct, the answer will "materially affect the course of [the] litigation." If the Federal Circuit were to reverse and adopt defendant's view, there would be no liability and the case would be over. If it were to reverse and adopt plaintiffs' view or affirm this Court, the case would continue, but the nature of what would follow would differ significantly. If the Circuit were to adopt plaintiffs' interpretation, the government would be liable for the difference between the approximately $923 million in PACER user fees collected from 2010 to 2016 and the "marginal cost" of operating PACER. Therefore, the main issue would be determining the marginal cost of operating PACER. Plaintiffs concede that at least $129 million was part of the "marginal cost"

of operating PACER, while defendant admits that at least $271 million was not,[2] and as to the remaining $522 million the parties agree "at least some" is not part of the "marginal cost," but there is no agreement as to how much of that $522 million is part of the marginal cost.[3] On the other hand, if the Federal Circuit affirms this Court's Order, there will be no need to determine the marginal cost of operating PACER, for the only issue unresolved by the Court's opinion is the precise amount spent from PACER fees on impermissible expenditures.[4] These vastly different possible outcomes lead to the conclusion that immediate review of the March 31, 2018 Order will materially affect the course of this litigation with resulting savings of time and resources.

Accordingly, the March 31, 2018 Order involves a "controlling question of law."

2. Substantial ground for difference of opinion

The second requirement for § 1292(b) certification is that there must "exist a substantial ground for difference of opinion." "A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *APCC Servs.*, 297 F. Supp. 2d at 97. Here, there is a complete absence of any precedent from any jurisdiction. In addition, although the Court ultimately found the arguments

[2] Defendant admits that none of the money spent on EBN, the State of Mississippi study, the VCCA Notification System, and Web-Based Juror Services was part of the "marginal cost" of operating PACER,

[3] Defendant admits that "at least some of the money" spent on CM/ECF, Telecommunications, Court Allotments, and Courtroom Technology is not part of the "marginal cost" of operating PACER.

[4] Based on the current record, that amount is approximately $192 million. This number reflects the total expenditures from 2010 to 2016 for the State of Mississippi study ($120,998); the Violent Crime Control Act notification system ($3,650,979); Web-Based Juror Services ($9,443,628); and Courtroom Technology ($185,001,870), less the expenditures made for digital audio equipment, including software ($6,052,647).

in favor of each parties' position unpersuasive, this Court's opinion made clear that these arguments are not without merit and that "the issue is truly one on which there is a substantial ground for dispute." *APCC Servs.*, 297 F. Supp. 2d at 98; *see also Molock v. Whole Foods Mkt. Grp.*, 2018 WL 2926162, at *3 (D.D.C. June 11, 2018). Accordingly, the Court concludes that there exists a substantial ground for difference of opinion on the issue resolved by the March 31, 2018 Order.

3. Materially advance the litigation

The third requirement for § 1292(b) certification is that an immediate appeal will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "To satisfy this element a movant need not show that a reversal on appeal would actually end the litigation. Instead, the relevant inquiry is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock*, 2018 WL 2926162, at *3 (citing *APCC Servs.*, 297 F. Supp. 2d at 100). Here, there is no question that this requirement is satisfied. As previously explained, if the Court's Order is reversed in the government's favor, the litigation will be over. If it is reversed in plaintiffs' favor, it would significantly alter the issues to be addressed. Either outcome now, instead of later, would conserve judicial resources and save the parties from needless expenses. Thus, before proceeding to a potentially lengthy and complicated damages phase based on an interpretation of the statute that could be later reversed on appeal, it is more efficient to allow the Federal Circuit an opportunity first to determine what the statute means. Accordingly, the Court concludes that an immediate appeal will "materially advance the ultimate termination of the litigation."

CONCLUSION

Having concluded that the March 31, 2018 Order satisfies all three requirements for §1292(b) certification, the Court will exercise its discretion and certify that Order for immediate appeal. A separate Order accompanies this Memorandum Opinion.

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

NOTICE OF GRANT OF PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)

Notice is hereby given on this 28 day of November, 2018, that the plaintiffs' petition for permission to appeal the order entered on March 31, 2018 (ECF. No. 88) was granted by the United States Court of Appeals for the Federal Circuit. Both parties filed petitions for permission to appeal on August 22, 2018 (Fed. Cir. Nos. 18-154, 18-155), which were granted on October 16, 2018 (Fed. Cir. Nos. 19-1081, 19-1083). The order granting permission to appeal is attached.

Pursuant to Fed. R. App. P. Rule 5(d), plaintiffs file this notice to effect payment of the filing fee for the appeal.

Respectfully submitted,

/s/ Meghan S.B. Oliver

Meghan S.B. Oliver (D.C. Bar No. 493416)
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com
jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1681
bnarwold@motleyrice.com

Elizabeth Smith (D.C. Bar No. 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 1001
Washington, DC 20004
(202) 232-5504

Attorneys for Plaintiffs

November 28, 2018

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE,
Plaintiffs-Respondents

v.

UNITED STATES,
Defendant-Petitioner

2018-154

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the United States District Court for the District of Columbia in No. 1:16-cv-00745-ESH, Judge Ellen S. Huvelle.

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE,
Plaintiffs-Petitioners

v.

UNITED STATES,
Defendant-Respondent

2018-155

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the United States District Court for the District of Columbia in No. 1:16-cv-00745-ESH, Judge Ellen S. Huvelle.

ON PETITION

Before PROST, *Chief Judge*, NEWMAN and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

O R D E R

The parties both petition for permission to appeal an order of the United States District Court for the District of Columbia concerning the extent to which fee revenue generated by the federal judiciary's Public Access to Court Electronic Records ("PACER") system may be used for purposes other than the operation of PACER.

This case arises out of a class action brought by National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice (collectively, "the plaintiffs") against the United States, alleging that fees charged for using PACER from 2010 to 2016 violated 28 U.S.C. § 1913 note, as amended by the E-Government Act of 2002. That provision states, in relevant part, "[t]he Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment. . . . [These fees] shall be deposited as offsetting collections to the Judiciary Automation fund . . . to reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note.

After the district court denied the United States' motion to dismiss the complaint for failing to establish a cognizable claim for damages under the Little Tucker Act, 28 U.S.C. § 1346(a), the parties filed cross-motions for summary judgment of liability. The plaintiffs argued that the E-Government Act barred the judiciary from using PACER fees for anything other than the marginal cost of operating PACER. The government asserted that PACER fees can be spent on any expenditure involving the dissemination of information through electronic means.

The district court adopted neither party's position. Instead, it determined that revenue from the PACER system may be used only for "expenses incurred in providing services . . . that are part of providing the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system." *Nat'l Veterans Legal Servs. Program v. United States,* 291 F. Supp. 3d 123, 149 (D.D.C. Mar. 31, 2018). On this basis, the district court ruled that several categories of the judiciary's expenditures were impermissible but also rejected the plaintiffs' position that the class was entitled to fees paid in excess of the amount necessary to recoup the total marginal cost of operating PACER.

At the request of both parties, the district court certified its summary judgment order for interlocutory appeal and stayed further proceedings. The district court noted that the issue to be appealed was a purely legal one, that the issue was one of first impression, and that interlocutory appeal would materially advance the litigation because "before proceeding to a potentially lengthy and complicated damages phase based on an interpretation of the statute that could be later reversed on appeal, it is more efficient to allow the Federal Circuit an opportunity first to determine what the statute means."

Under 28 U.S.C. § 1292(b), a district court may certify that an order that is not otherwise appealable is one involving a controlling question of law as to which there is

substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the litigation. Ultimately, this court must exercise its own discretion in deciding whether it will grant permission to appeal an interlocutory order. *See In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822, 822 (Fed. Cir. 1990). Having considered the petitions, we agree with the parties and the district court that interlocutory review is appropriate here.

Accordingly,

IT IS ORDERED THAT:

The petitions are granted.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-0745 (PLF)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The Court has before it a pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions ("Pines Mot.") [Dkt. No. 116], filed by putative plaintiff-intervenor Michael T. Pines. Plaintiffs National Veterans Legal Services Program, et al., and defendant the United States oppose the motion. See Plaintiffs' Response to Michael Pines's Motion for Intervention, to Modify the Class Definition, and for Sanctions ("Pl. Opp.") [Dkt. No. 122]; Defendant's Response to Michael Pines's Motion for Intervention, to Modify the Class Certification Order, and for Sanctions ("Def. Opp.") [Dkt. No. 124]. Upon careful consideration of the parties' papers, the relevant rules, and the applicable case law, the Court will deny Mr. Pines's motion in all respects.

Mr. Pines has also submitted via email to the Clerk's Office several additional requests for relief, which he suggests are related to this case. Because the Court concludes that Mr. Pines is not entitled to intervene, it will deny as moot his other requests, with the exception of his application to proceed without prepaying fees or costs, which the Court will grant.

I. BACKGROUND

This case is proceeding as a class action on behalf of "[a]ll individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities." Nat'l Veterans Legal Servs. Program v. United States ("NVLSP Class Cert. Op."), 235 F. Supp. 3d 32, 39 (D.D.C. 2017). The United States confirms that Mr. Pines paid PACER fees during the class period and therefore is a member of the class. Defendant's Supplemental Brief in Response to Court Order Dated October 12, 2021 ("Def. Suppl.") [Dkt. No. 126] at 1. Plaintiffs represent that "[c]lass notice was successfully sent to the email address associated with Michael Pines's PACER account on May 19, 2017," and that Mr. Pines did not opt out by the deadline provided in that notice. Plaintiffs' Supplemental Brief in Response to This Court's Order ("Pl. Suppl.") [Dkt. No. 127] at 1-2.

Mr. Pines asserts that he learned of the class action sometime in August of 2020. Pines Mot. at 10, 12. He seeks to intervene because, he says, he "was precluded from negotiations so any settlement based on previous discussions would be improper as not negotiated fairly," id. at 10, and "the class action attorneys will not even allow him to participate in discussions outside of court or cooperate in other ways," id. at 12. He expresses concern that if the Court approves a class settlement, he may face "questions regarding res judicata and the scope of the class release" if he "raises similar claims – or claims based on similar facts – in a subsequent case." Id. at 9. Mr. Pines asserts that he is entitled to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and in the alternative, that the Court should authorize permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Id. at 11-12.

Mr. Pines also seeks to modify the class certification order, arguing that a class action is not "superior to other types of actions" in this case, Pines Mot. at 5, because "[t]he obvious way to calculate damages in light of court rulings to date," id. at 3, "would not result in

the class members receiving appropriate compensation," id. at 4. He further argues that "potential plaintiffs may have all kinds of claims against the government related to the operation of Pacer, and . . . there is not even a way to calculate the type of damages the class action seeks." Id. at 10. Finally, Mr. Pines asks the Court to award $25,000 in sanctions "against both plaintiff and defense counsel," because he was not "given the opportunity to participate when he demanded it in August 2020," and as a result, "he will have to spend large amounts of time" getting up to speed on the case. Id. at 13.

II. DISCUSSION

A. Intervention of Right

Rule 24(a)(2) of the Federal Rules of Civil Procedure grants a right of intervention to a party who, upon timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2). Courts consider four factors in deciding whether a party has a right to intervene: (1) the timeliness of the motion; (2) whether the party claims an interest relating to the subject of the action; (3) whether disposition of the action without the party may impair or impede the applicant's ability to protect that interest; and (4) whether the party's interest is adequately represented by the existing parties. Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731-32 (D.C. Cir. 2003).

When a class member moves to intervene in a class action, the issue is "correctly framed . . . as whether the would-be intervenors [a]re adequately represented." Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997); see also In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005) ("In the class action context, the second and third prongs of

the Rule 24(a)(2) inquiry [concerning interest in the litigation and impairment of that interest] are satisfied by the very nature of Rule 23 representative litigation."). To prevail, therefore, Mr. Pines must show that "the named plaintiffs cannot [adequately] represent his interests," Barnes v. District of Columbia, 274 F.R.D. 314, 319 (D.D.C. 2011), either because they "have antagonistic or conflicting interests with the unnamed members of the class" or because they do not "appear able to vigorously prosecute the interests of the class through qualified counsel," Twelve John Does v. District of Columbia, 117 F.3d at 575.

Mr. Pines has not made such a showing. "When the Court certified the class in this case [], it necessarily found that 'the representative parties will fairly and adequately protect the interests of the class.'" Barnes v. District of Columbia, 274 F.R.D. at 316 (quoting FED. R. CIV. P. 23(a)(4)). Judge Huvelle, who presided over this case prior to her retirement, concluded that "the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives," because "[t]hey are interested in reducing PACER fees not only for themselves but also for their constituents . . . . [they] exist to advocate for consumers, veterans, and other public-interest causes . . . . [and] organizational representatives with experience can provide more vigilant and consistent representation than individual representatives." NVLSP Class Cert. Op., 235 F. Supp. 3d at 42 (quotation marks omitted).

These characteristics remain salient to representing the interests of the class today. The class representatives have vigorously and effectively advocated on behalf of the class during the course of this litigation. They obtained a finding of liability against the United States in this Court, which the Federal Circuit affirmed on appeal. See Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123, 140 (D.D.C. 2018) ("[T]he Court . . . finds the defendant liable for certain costs that post-date the passage of the E-Government Act."); Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340, 1357 (Fed. Cir. 2020) ("[W]e agree with

the district court's determination that the government is liable for the amount of [PACER] fees used to cover [certain categories of] expenses."). The parties now are engaged in settlement discussions and recently represented that they "have reached an agreement in principle on proposed terms to resolve the matter, subject to Defendant obtaining approval of the proposed terms of settlement from the United States Department of Justice." Nov. 15, 2021 Joint Status Report [Dkt. No. 129] at 1. Nothing in Mr. Pines's submissions indicates that the named plaintiffs are in any way failing to fulfill their role on behalf of the class.

Mr. Pines's motion focuses instead on his desire to provide input on settlement negotiations and case strategy. Mr. Pines asserts that he "has been trying to work with counsel" and has "tried to discuss [a] settlement," but that "the class action attorneys will not even allow him to participate in discussions outside of court or cooperate in other ways." Pines Mot. at 12; see also Declaration of Michael T. Pines in Support of Motions to Modify Class Certification and to Intervene and for Sanctions ("Pines Decl.") [Dkt. No. 116-1] ¶ 96 ("Had I been permitted to be involved in settlement discussions, I had some ideas that might have been helpful."). As a class member, Mr. Pines is entitled to receive certain information about the class action, including information about opting out of the class and about any settlement or compromise. See FED. R. CIV. P. 23(c)(2), (e)(1). Mr. Pines "will have the right to object to any settlement [that] the parties may reach." Pl. Opp. at 3; see also FED. R. CIV. P. 23(e)(5). He is not, however, entitled to "work with counsel," Pines Mot. at 12, or "be involved in settlement discussions," Pines Decl. ¶ 96. The fact that Mr. Pines may disagree with class counsel's approach does not mean that class representation is inadequate, because a class action by its nature entails delegating certain litigation functions to class representatives and class counsel.

Mr. Pines also appears to disagree with the scope of the claims being pursued, noting that "people have suffered other types of damages caused by Pacer which the action does

not seek to redress." Pines Mot. at 2; see also id. at 8. Yet Judge Huvelle certified a single class claim in this case: "that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under the Little Tucker Act." Jan. 24, 2017 Order [Dkt. No. 32] at 1. The fact that class counsel have not pursued other arguments that go beyond the certified claim does not suggest that their representation is deficient.

Even if Mr. Pines could show that class counsel and the named plaintiffs do not adequately represent his interests in this case, his motion is not timely. "A nonparty must timely move for intervention once it becomes clear that failure to intervene would jeopardize her interest in the action." Harrington v. Sessions (In re Brewer), 863 F.3d 861, 872 (D.C. Cir. 2017). According to plaintiffs, "[c]lass notice was successfully sent to the email address associated with Michael Pines's PACER account on May 19, 2017." Mr. Pines therefore should have been aware of this class action more than four years before he moved to intervene.

Mr. Pines asserts that he "only found out about this action in August 2020." Pines Mot. at 12. Even if Mr. Pines could show that he was not properly notified on May 19, 2017, he still allowed a year to elapse before seeking to intervene on August 11, 2021. He suggests that when he "heard nothing" from counsel, Pines Decl. ¶ 54, he "decided to take a new legal approach," id. ¶ 55, implying that he moved to intervene after it became apparent that he would not achieve his desired result by contacting class counsel. This does not justify a twelve-month delay while the case progressed and the parties engaged in settlement negotiations. See In re Lorazepam & Clorazepate Antitrust Litig. v. Mylan Labs ("In re Lorazepam"), 205 F.R.D. 363, 368 (D.D.C. 2001) (finding motion to intervene untimely where the purported intervenor "waited nine months to file th[e] motion, pointing to Class Counsel's [] refusals to cooperate as its only explanation for doing so"); Allen v. Bedolla, 787 F.3d 1218, 1222 (9th

Cir. 2015) (finding a motion to intervene untimely that was "filed after four years of ongoing litigation, on the eve of settlement, and threatened to prejudice settling parties by potentially derailing settlement talks").

Mr. Pines is not entitled to intervene as of right under Rule 24(a)(2) because he has not demonstrated that his interests are inadequately represented and because his motion to intervene is not timely.

B. Permissive Intervention

Pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, a court has discretion to permit a party to intervene upon timely motion where the intervening party "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). The D.C. Circuit has articulated three requirements that a putative intervenor ordinarily must meet: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998); see also Envt'l. Defense v. Leavitt, 329 F. Supp. 2d 55, 66 (D.D.C. 2004). A court's decision pursuant to Rule 24(b) is discretionary and a district court may "deny a motion for permissive intervention even if the movant establishe[s]" all three of these requirements. E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d at 1048. In exercising its discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

The Court concludes that permissive intervention is not warranted under Rule 24(b). First, Mr. Pines's motion is not timely for the reasons set forth above. Second, while Mr. Pines's submission may share some "question[s] of law or fact in common with the main

action," E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d at 1046, he also raises numerous issues and arguments that that go far beyond the scope of the class claim. See Pines Mot. at 8 ("[P]laintiffs who have claims against Pacer might have many varied claims . . . . They should have all their fees reimbursed."); Pines Decl. ¶ 94 (seeking $10,000 for each time Mr. Pines logged into PACER during the class period); Pines Decl. ¶¶ 3-6 ("I have been exposing bad conduct by the 'Too Big To Fail Banks' and the complicity of the federal and state governments since about 2010 . . . . As a result, I was disbarred, put in jail, prison, and mental hospitals but was innocent of any wrongdoing. The proposed legal action concerns this."); see also id. ¶¶ 39-42 (describing eviction action and subsequent court proceedings).

In addition, allowing Mr. Pines to intervene could seriously disrupt the settlement discussions, which may resolve this case, and therefore could derail a final resolution of the parties' rights. In the context of a motion to intervene in a class action, "the Court must strike [] a 'balance between keeping class litigation manageable and allowing affected parties to be adequately heard.'" In re Lorazepam, 205 F.R.D. at 367 (quoting Twelve John Does v. Disrict of Columbia, 117 F.3d at 575). As plaintiffs explain, this case has proceeded through class certification, summary judgment on liability, and an appeal to the Federal Circuit, and the parties are now engaged in mediation toward "a potential global settlement." Pl. Opp. at 1-2. Mr. Pines "now asks the Court to undo all this," id. at 2, by seeking to modify the class certification order despite "not identify[ing] any defect in the class definition or class claim," id. at 3.

Mr. Pines "has already shown [] willingness . . . to delay the proceedings," including by moving to decertify the class, seek sanctions, and raise factual issues and legal arguments outside the scope of the class claim. Barnes v. District of Columbia, 274 F.R.D. at 319 (finding that intervention would "unduly delay the adjudication of the original parties' rights" where the putative intervenor had filed a motion for declaratory judgment, a motion to stay

proceedings pending adjudication of his motions, and had requested "essentially all of the discovery" in the case). Mr. Pines suggests that if allowed to intervene he would "subpoena any and all emails by and among counsel to find out what they have said and what has happened," and acknowledges that "[i]t is difficult for Pines to determine what amount of excess costs and expenses he will incur." Pines Mot. at 13. He also suggests that he "intend[s] to object to any settlement and [counsel] might be wasting time and energy trying to settle until after the court heard the motion to decertify." Pines Decl. ¶ 52.

Given the advanced posture of this case, the nature of the intervention that Mr. Pines states that he intends to pursue, and the fact that Mr. Pines has not established that he is inadequately represented, the Court concludes that the "balance between keeping class litigation manageable and allowing affected parties to be adequately heard," In re Lorazepam, 205 F.R.D. at 367, weighs against intervention. The Court therefore will deny Mr. Pines's request.

C. Modification of Class Certification Order, Sanctions, and Other Relief

Because the Court concludes that Mr. Pines may not intervene in this case, it will deny as moot his requests to modify the class certification order and for sanctions.

Mr. Pines also submitted via email to the Clerk's Office a Motion for Pretrial Conference and to Appoint a Special Master, an Application to Proceed in District Court Without Prepaying Fees or Costs, and an Emergency Motion for Order to Reactivate PACER Account [Dkt. No. 125], which the Court granted leave to be filed on the docket. Because the Court denies Mr. Pines's motion to intervene, and Mr. Pines therefore is not a party to this case, it also denies as moot the motion for pretrial conference and to appoint a special master, and the motion to reactivate PACER account.

The Court will grant Mr. Pines's application to proceed without prepaying costs and will direct the Clerk's Office to file that application on the docket. That application would not be moot if Mr. Pines seeks to appeal this order. In addition, the Court finds that Mr. Pines has shown that he is unable to pay the filing fees in the court of appeals. See 28 U.S.C. § 1915(a)(1).

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Mr. Pines's pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions [Dkt. No. 116] is DENIED; it is

FURTHER ORDERED that Mr. Pines's Motion for Pretrial Conference and to Appoint a Special Master is DENIED as moot; it is

FURTHER ORDERED that Mr. Pines's Emergency Motion for Order to Reactivate PACER Account [Dkt. No. 125] is DENIED as moot; and it is

FURTHER ORDERED that Mr. Pines's Application to Proceed in District Court Without Prepaying Fees or Costs is GRANTED and the Clerk of the Court is directed to file that application on the docket in this case.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 11/16/21

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5204 **September Term, 2021**

1:16-cv-00745-PLF

Filed On: November 15, 2021

In re: Michael T. Pines,

Petitioner

BEFORE: Rao and Walker, Circuit Judges, and Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the corrected petition for writ of mandamus and the supplement thereto, the motion for leave to proceed in forma pauperis, the emergency motion to reactivate PACER account, and the opposition thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. Under the All Writs Act, 28 U.S.C. § 1651 (1982), federal courts may issue all writs "necessary or appropriate in aid of their respective jurisdictions." "[A]uthority under the All Writs Act 'extends to those cases which are within [a court's] appellate jurisdiction although no appeal has been perfected.'" In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (internal citation omitted) (dismissing petition because court had "no future appellate jurisdiction that a writ of mandamus could protect"). Here, the Federal Circuit has exclusive jurisdiction over any appeal arising from the case which is the subject of the instant petition. See 28 U.S.C. § 1295(a)(2). Thus, there is no basis upon which the underlying case could be brought within this court's appellate jurisdiction. It is

FURTHER ORDERED that the emergency motion to reactivate PACER account be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Lynda M. Flippin
Deputy Clerk

Michael T. Pines
12303 Harbour Pointe Blvd.
#N-203
Mukilteo, WA 98275
619-771-5302
magicalmichael100@gmail.com

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et. al. Plaintiffs v. UNITED STATES OF AMERICA, Defendant		Case No. 1:16-cv-00745-PLF **NOTICE OF APPEAL**

Michael T. Pines appeals to the United States Court of Appeals for the District of Columbia from the order denying the Motions to Intervene and For Leave To File A Complaint In Intervention, Motion to Modify Class Certification Order, and for Sanctions entered on November 16, 2021.

Dated: December 16, 2021 /s/ Michael T. Pines

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5291 **September Term, 2022**

1:16-cv-00745-PLF

Filed On: November 14, 2022 [1973453]

National Veterans Legal Services Program,
et al.,

Appellees

v.

United States of America,

Appellee

Michael T. Pines,

Appellant

MANDATE

In accordance with the order of September 28, 2022, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Link to the order filed September 28, 2022

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5291 **September Term, 2022**

1:16-cv-00745-PLF

Filed On: September 28, 2022 [1966506]

National Veterans Legal Services Program,
et al.,

Appellees

v.

United States of America,

Appellee

Michael T. Pines,

Appellant

ORDER

By order filed July 22, 2022, appellant was directed to file their initial submissions by August 22, 2022. To date, no initial submissions have been received from appellant. Upon consideration of the foregoing, it is

ORDERED that this case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

The Clerk is directed to issue the mandate in this case by November 14, 2022.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura M. Morgan
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-PLF

PLAINTIFFS' REVISED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

William H. Narwold
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

Meghan S.B. Oliver
Charlotte E. Loper
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

Counsel for Plaintiffs
National Veterans Legal Services Program,
National Consumer Law Center, Alliance for Justice, and the Class

April 12, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other authorities

INTRODUCTION

In the history of American litigation, this case is unique: a certified class action against the federal judiciary. The plaintiffs challenged the fees that the judiciary charges for access to records through its Public Access to Court Electronic Records system, or PACER. They sought to vindicate a single claim: that the judiciary violated the law by charging fees that exceeded the cost of providing the records. And they sought one form of relief: refunds.

After more than six years of hard-fought litigation, the plaintiffs have now secured a historic settlement under which the government must reimburse the vast majority of PACER users in full—100 cents on the dollar—for past PACER charges. The settlement creates a common fund of $125 million from which each class member will automatically be reimbursed up to $350 for any PACER fees paid between April 21, 2010, and May 31, 2018. Those who paid over $350 in fees during that period will receive their pro rata share of the remaining settlement funds. Any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (subject to the caveat that no class member may receive more than the total fees that she paid). In addition to this remarkable monetary relief, the case has spurred the judiciary to eliminate fees for 75% of users going forward and prompted action in Congress to abolish the fees altogether.

By any measure, this litigation has been an extraordinary achievement—and even more so given the odds stacked against it. PACER fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until this case was filed, litigation wasn't seen as a realistic path to reform. That was for three reasons. First, the judiciary has statutory authority to charge at least *some* fees, so litigation alone could never result in a free PACER system. Second, few lawyers experienced in complex federal litigation would be willing to sue the federal judiciary—and spend considerable time and resources challenging decisions made by the Judicial Conference of the United States—with little hope of

payment. Third, even if PACER fees could be shown to be excessive and qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. A lawsuit challenging PACER fees had been dismissed for lack of jurisdiction, and advocates had been unable for years to identify an alternative basis for jurisdiction, a cause of action, and a statutory waiver of sovereign immunity. So they devoted their efforts to other strategies: making some records freely available in a separate database, downloading records in bulk, and mounting public-information campaigns.

These efforts were important, but they didn't alter the PACER fee system. Despite public criticism—and despite being reproached in 2009 and 2010 by Senator Joe Lieberman, the sponsor of a 2002 law curtailing the judiciary's authority to charge fees—the Administrative Office of the U.S. Courts did not reduce PACER fees. To the contrary, the AO *increased* fees in 2012.

There things stood until 2016, when three nonprofits filed this suit under the Little Tucker Act, a post-Civil-War-era statute that "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996). Because the Act provides jurisdiction only for claims seeking money for past overpayments, the plaintiffs could not demand that the judiciary lower PACER fees going forward. They could seek only retroactive monetary relief.

Even with this limitation, this lawsuit has been a resounding success at every step. The plaintiffs defeated a motion to dismiss and obtained certification of a nationwide class by early 2017. Through discovery, they were then able to shine a light on how the AO had used the fees. Many things funded by the fees—such as flat screens for jurors—had nothing to do with PACER. This discovery in turn led to an unprecedented decision: In March 2018, this Court held that the AO had violated the law by using PACER fees to fund certain activities. Within months, the judiciary announced that these activities would "no longer be funded" with PACER fees. Gupta Decl. ¶ 18.

Success continued on appeal. In the Federal Circuit, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups, and the sponsor of the 2002 law"—all detailing the harms of high PACER fees. *See* Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times, Feb. 4, 2019, https://perma.cc/LN5E-EBE9. Media outlets published editorials championing the lawsuit. *See, e.g.*, *Public Records Belong to the Public*, N.Y. Times, Feb. 7, 2019, https://perma.cc/76P8-WFF7. And before long, the AO announced that it was doubling the quarterly fee waiver for PACER, eliminating fees for approximately 75% of PACER users. Gupta Decl. ¶ 20. Then the plaintiffs secured a landmark Federal Circuit opinion unanimously affirming this Court's decision. *NVLSP v. United States*, 968 F.3d 1340 (Fed. Cir. 2020).

The litigation sparked widespread public interest in the need to reform PACER fees and jumpstarted legislative action that continues to this day. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support recently advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22. The Judicial Conference, too, now supports legislation providing for free PACER access to noncommercial users. *Id.* Were Congress to enact such legislation into law, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone.

As for fees already paid—the claims at issue here—they will be refunded. Under the settlement, the average PACER user will be fully reimbursed for all PACER fees paid during the class period. And class members will not need to submit a claim to be paid.

This is an extraordinarily favorable result for the class, and it easily satisfies Rule 23(e)(2)'s criteria. As we will explain, the plaintiffs ask the Court to enter an order (1) finding that settlement approval is likely and certifying the expanded settlement class, (2) approving the revised notice plan and directing that notice be provided, and (3) scheduling a hearing to consider final approval and a forthcoming request for fees, costs, and service awards for the class representatives.

BACKGROUND

A. Factual and procedural background

1. The legal framework for PACER fees

By statute, the judiciary has long had authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then $.07 per page) were "higher than the marginal cost of disseminating the information," creating excess fee revenue that the judiciary had begun using to fund other projects. S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.*

To this end, Congress passed the E-Government Act of 2002, which amended the statute by adding the words "only to the extent necessary." 28 U.S.C. § 1913 note. Despite this limitation, the AO twice increased PACER fees in the years after the E-Government Act's passage—first to $.08 per page, and then to $.10 per page—during a time when the costs of electronic data storage plunged exponentially. Gupta Decl. ¶ 4. This widening disparity prompted the Act's sponsor, Senator Lieberman, to reproach the AO for charging fees that were "well higher than the cost of dissemination," "against the requirement of the E-Government Act." ECF Nos. 52-8 & 52-9.

Excessive PACER fees have inflicted harms on litigants and the public alike. Whereas the impact of excess fees on the judiciary's $7-billion annual budget is slight, these harms are anything but: High PACER fees hinder equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts. And the AO had further compounded the harmful effects of high fees in recent years by discouraging fee waivers, even for pro se litigants, journalists, researchers, and nonprofits; by prohibiting the free transfer of information by those who obtain waivers; and by hiring private collection lawyers to sue people who could not afford to pay the fees.

2. District court proceedings

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this lawsuit. From the start, the plaintiffs were represented by an expert team drawn from the law firms of Gupta Wessler PLLC, a litigation boutique with experience bringing complex cases against the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. The plaintiffs asked the Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges—the only relief available to them under the Little Tucker Act. *See* 28 U.S.C. § 1346(a). Because the judiciary is not subject to the APA, 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek injunctive relief requiring the AO to lower PACER fees in the future.

This Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF No. 24 & 25. A month later, in January 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' illegal-exaction Little Tucker Act claim for classwide treatment and appointed Gupta Wessler and Motley Rice as co-lead class counsel. *Id.*

The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (or KCC) as claims administrator. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, only about 1,100 opted out of the class. Gupta Decl. ¶ 14.

Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only what the judiciary labeled as "Public Access Services," but also "Case Management/Electronic Case Files System" (or CM/ECF); "Electronic Bankruptcy Notification"; "Communications Infrastructure, Services,

and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi."

Based on this discovery, the parties filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to disseminating information through electronic means.

In March 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [PACER] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "properly used PACER fees to pay for CM/ECF and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

In the months that followed, the AO took steps "to implement the district court's ruling" and "reduce potential future legal exposure." Gupta Decl. ¶ 18. It announced in July 2018 that these four categories would "no longer be funded" with PACER fees. *Id.* "The Judiciary will instead seek appropriated funds for those categories," as it does for over 98% of its budget. *Id.* A year later, the AO announced that it was doubling the quarterly fee waiver for PACER—from $15 to $30—which had the effect of eliminating PACER fees for approximately 75% of PACER users. *Id.* ¶ 20.

3. Appellate proceedings

Both parties sought permission for an interlocutory appeal from this Court's decision, and the Federal Circuit accepted both appeals. The parties adhered to their same interpretations of the statute on appeal. The plaintiffs' position was supported by a broad array of amici curiae—a group of prominent retired federal judges, Senator Lieberman, media organizations, legal-technology firms, and civil-liberties groups from across the ideological spectrum—detailing the harms caused by high PACER fees. *See* Liptak, *Attacking a Pay Wall that Hides Public Court Filings*. In response, the government defended the full amount of PACER fees, while strenuously arguing that the court lacked jurisdiction under the Little Tucker Act.

The Federal Circuit rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP*, 968 F.3d at 1350. It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (those not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was a "potential source of liability" because the court could not confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The Federal Circuit left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

Following the Federal Circuit's decision, federal lawmakers swung into action. The House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support recently advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22.

B. Mediation and settlement negotiations

On remand, the case was reassigned to Judge Friedman, and the parties came together to discuss the path forward. They understood that litigating the case to trial would entail significant uncertainty and delay. *Id.* ¶ 23. Years of protracted litigation lay ahead. And the range of potential outcomes was enormous: On one side, the government argued that it owed zero damages because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower (a litigating position that also made it difficult for the judiciary to lower fees while the case remained pending). *Id.* On the other side, the plaintiffs maintained that liability had been established for four categories of expenses and that some portion of the CM/ECF expenditures were likely improper as well. *Id.*

Hoping to bridge this divide and avoid a lengthy delay, the parties were able to agree on certain structural aspects of a potential settlement and then agreed to engage in mediation on the amount and details. *Id.* ¶ 24. On December 29, 2020, at the parties' request, this Court stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation. *Id.*

Over the next few months, the parties exchanged information and substantive memoranda, which provided a comprehensive view of the strengths and weaknesses of the case. *Id.* ¶ 25. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, an experienced and accomplished mediator agreed upon by the parties. *Id.*

With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. *Id.* ¶ 26. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-made settlement, and the plaintiffs' agreed to consider the government's final offer concerning the total amount of that fund. *Id.* But by the time the session ended, the parties still hadn't agreed on the total amount of the common fund or other important terms—including how the money would

be distributed, what to do with any unclaimed funds after the initial distribution, and the scope of the release. *Id.* ¶ 27 Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were ultimately able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. *Id.* The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed. *Id.*

Further progress was slow, and at times the parties reached potentially insurmountable impasses. *Id.* ¶ 28. But over a period of many months, they were able to resolve their differences and reach an agreement, the final version of which was executed on July 27, 2022. *Id.* ¶ 28; Gupta Decl. Ex. A ("Agreement"). The parties executed a supplemental agreement in September 2022 making certain technical modifications to the agreement. Gupta Decl. Ex. B ("Supp. Agreement"). The parties executed a second supplemental agreement in April 2023, allowing for additional time that the administrator may need for distribution. Gupta Decl. Ex. C ("Second Supp. Agreement").

C. Overview of the settlement agreement

1. The settlement class

As clarified by the supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period"), excluding opt-outs, federal agencies, and class counsel. Agreement ¶ 3; Supp. Agreement. The Class Period does not go beyond May 31, 2018 because the AO stopped using PACER fees to fund the four categories of prohibited expenses after this date.

This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Agreement ¶ 4. Because this second group of people are not part of the original class, they did not

receive notice or a right to opt out when the original class was certified. For that reason, under the settlement, these additional class members will receive notice and an opportunity to opt out. *Id.*

2. The settlement relief

The settlement provides for a total common-fund payment by the United States of $125 million, which covers the monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11.

Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust. *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16.

3. The released claims

In exchange for the relief provided by the settlement, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the Class Period. *Id.* ¶ 13. This release does not cover any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.), the only other pending PACER-fee related lawsuit of which the AO is aware. Agreement ¶ 13. The amount of settlement funds disbursed to any class member in this case, however, will be deducted from any recovery that the class member may receive in *Fisher*. *Id.*[1]

4. Notice to settlement class

Within 30 days of an order approving settlement notice to the class (or within 30 days of KCC's receipt of the necessary information from the AO, whichever is later), KCC will provide

[1] The individual plaintiff in *Fisher* alleges that PACER, in violation of its own terms and conditions, overcharges its users due to a systemic billing error concerning the display of some HTML docket sheets—an issue not raised in this case. The case did not challenge the PACER fee schedule itself, and it is not a certified class action.

notice via publication and email to all class members for whom the AO has an email address on file. *Id.* ¶ 29; Gupta Decl. Ex. D, Revised Proposed Notice Plan ("Proposed Notice Plan") ¶¶ 2-3. Within 45 days of the order approving settlement notice, KCC will send postcard notice via U.S. mail to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Agreement ¶ 29; Proposed Notice Plan ¶ 6. KCC will also provide the relevant case documents on a website it has maintained that is dedicated to the settlement (www.pacerfeesclassaction.com). Agreement ¶ 29; Proposed Notice Plan ¶ 4. The notice will include information on how accountholders can notify KCC that an entity paid PACER fees on their behalf; information on how payers can notify KCC that they paid PACER fees on an accountholder's behalf; an explanation of the procedures for allocating and distributing the trust funds; the date upon which the Court will hold a fairness hearing under Rule 23(e); and the date by which class members must file their written objections, if any, to the settlement. Agreement ¶ 29; Proposed Notice Plan at 2.

5. Opt-out rights for the April 22, 2016 to May 31, 2018 class members

The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018, and thus are not part of the class already certified—will also inform them of their right to opt out and the procedures through which they may exercise that right. Proposed Notice Plan ¶ 7. The opt-out period for these additional class members will be 90 days. *Id.*

6. Allocation and payment

Under the settlement, class members will not have to submit a claim to receive their payment. Agreement ¶ 16. Instead, KCC will use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.*

The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18. KCC

will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to at least $100 million.

First distribution. KCC will distribute the Remaining Amount to class members using the following formula: It will first allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the Class Period. *Id.* ¶ 19. Next, KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* KCC will then deduct this Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the Class Period. *Id.*

Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the Class Period will receive a payment equal to the total amount of PACER fees paid by that class member during the Class Period; and (b) each class member who paid more than $350 in PACER fees during the Class Period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

KCC will complete disbursement of each class member's share of the recovery within 180 days of receiving the $125 million from the United States, or within 180 days of receiving the necessary information from AO, whichever is later. Second. Supp. Agreement ¶ 21. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates,

and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. Agreement ¶ 22.

Second distribution. If, despite these efforts, unclaimed or undistributed funds remain in the settlement trust 180 days after KCC has made the distribution described in paragraph 21 of the Second Supplemental Agreement, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. Second Supp. Agreement ¶ 23. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the Class Period and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the Class Period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. *Id.* Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. Agreement ¶ 24. If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

7. Service awards, attorneys' fees, and costs

The plaintiffs intend to apply to this Court for a service award of up to $10,000 per class representative and for an award of attorneys' fees and expenses. *Id.* ¶ 28. The total amount

requested in service awards, fees, and expenses will not exceed 20% of the total common fund. *Id.* Approval of the settlement is not contingent on the Court granting these requests, and any amounts awarded by the Court will be paid out of the common fund. *Id.* As required by Rule 23(h), Class Members will receive notice of the motion for attorneys' fees and a right to object. *Id.*

8. Further settlement-related proceedings

Any class member may express her views to the Court supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Agreement ¶ 30. Counsel for the parties may respond to any objection within 21 days of receiving the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32; Proposed Notice Plan ¶ 8.

After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing, during which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Agreement ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.* The parties will request that the Court schedule the fairness hearing no later than 150 days after entry of the Court's order approving settlement notice to the class. *Id.*

Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, along with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41) and the February 2, 2023 stipulated supplemental protective order entered by this Court (ECF No. 146). After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

ARGUMENT

I. The Court should certify the settlement class.

The settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010 and May 31, 2018, excluding opt-outs, federal agencies, and class counsel. *Id.* ¶ 3 & Supp. Agreement. The vast majority of this class—anyone who paid PACER fees between April 21, 2010 and April 21, 2016—are members of the class certified by this Court in 2017. ECF No. 32. These class members have already received notice of the litigation and an opportunity to opt out.

A small subset of the class, however, has not. Settlement class members who paid PACER fees between April 22, 2016 and May 18, 2018, but not at any point in the six years prior, were not part of the original class certified by this Court. So they have not yet received notice or a chance to opt out. The plaintiffs therefore request that this Court certify, for settlement purposes only, an additional class that encompasses everyone who falls under this definition. This class meets the requirements of Rule 23(a) and 23(b)(3) for the same reasons as the original class. *See* ECF No. 33.

II. Because the settlement provides an exceptional recovery for the class, the Court should find that approval of the settlement is likely and direct that notice be provided to class members under Rule 23(e)(1).

Rule 23(e) requires court approval of a class-action settlement. This entails a "three-stage process, involving two separate hearings." *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 189–90 (D.D.C. 2017) (cleaned up). Before the Court may approve a class-action settlement, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, requires that the settlement be "fair, reasonable, and adequate."

The first stage, then, is for the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms," *Ross*, 267 F. Supp. 3d at 194—a process

often referred to as preliminary approval. *See Manual for Complex Litig.* § 21.632 (4th ed. updated 2022). If the Court preliminarily approves the settlement, the next stage is to direct that notice be "sent to the class describing the terms of the proposed settlement and explaining class members' options with respect to the settlement agreement . . . including the right to object to the proposed settlement." *Ross*, 267 F. Supp. 3d at 190; *see* William B. Rubenstein, *Newberg on Class Actions* § 13:1 (5th ed. updated 2022). The final stage involves a fairness hearing during which the Court examines the settlement and any objections to it, followed by a decision on whether to approve the settlement. *Id.*

This case is at the preliminary-approval stage. "Whether to preliminarily approve a proposed class action settlement lies within the sound discretion of the district court." *Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 482 (D.D.C. 2019). That discretion, however, "is constrained by the principle of preference favoring and encouraging settlement in appropriate cases." *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 16 (D.D.C. 2019); *see also id.* ("Class action settlements are favored as a matter of public policy."); *United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) ("Settlement is highly favored."). When a case settles early in the litigation, before any class has been certified, "the agreement requires closer judicial scrutiny than settlements that are reached after class certification." *Stephens*, 329 F.R.D. at 482 (cleaned up). But where, as here, a class has already been certified and the settlement follows years of hard-fought litigation, "[c]ourts will generally grant preliminary approval of a class action settlement if it appears to fall within the range of possible approval and does not disclose grounds to doubt its fairness or other obvious deficiencies." *Id.*; *see Richardson v. L'Oréal USA, Inc.*, 951 F. Supp. 2d 104, 106 (D.D.C. 2013).

The criteria guiding the preliminary-approval determination are supplied by Rule 23(e)(2), which requires consideration of whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief

provided for the class is adequate"; and "(D) the proposal treats class members equitably relative to each other." In considering these factors, the Court will also look to "the opinion of experienced counsel." *Stephens*, 329 F.R.D. at 486; *see also* Fed. R. Civ. P. 23, Advisory Committee Note, 2018 Amendments (observing that the Rule's enumerated factors were not intended to "to displace any factor" rooted in the case law). Each of these factors strongly supports preliminary approval here.

A. The class representatives and class counsel have vigorously represented the class throughout this litigation.

The first factor examines the adequacy of representation. In certifying the class in January 2017, this Court found that the three named plaintiffs are "particularly good class representatives" and that "[t]here is no dispute about the competency of class counsel"—Gupta Wessler, a litigation boutique with deep (and rare) experience in complex cases seeking monetary relief against the federal government, and Motley Rice, one of the nation's leading class-action firms. ECF No. 33 at 14–16.

That is no less true today. Since this Court's finding of adequate representation, the named plaintiffs and class counsel have spent nearly six years vigorously representing the class. They did so first in this Court, obtaining informal discovery from the judiciary that paved the way for an unprecedented decision concluding that the AO had violated the law with respect to PACER fees. They continued to do so on appeal, attracting a remarkable set of amicus briefs and favorable press coverage, and ultimately securing a landmark Federal Circuit opinion affirming this Court's decision and rejecting arguments made by the Appellate Staff of the U.S. Department of Justice's Civil Division. And they did so finally in mediation, spending months negotiating the best possible settlement for the class. In short, the representation here is not just adequate, but exemplary.

B. The settlement is the product of informed, arm's-length negotiations.

The next factor examines the negotiation process. It asks whether the negotiations were made at arm's length or whether there is instead some indication that the settlement could have been the product of collusion between the parties.

Here, "both sides negotiated at arms-length and in good faith," and "the interests of the class members were adequately and zealously represented in the negotiations." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9 (D.D.C. 2006) (Friedman, J.). The plaintiffs were represented by class counsel, while lawyers at the Department of Justice and the AO appeared for the government. "Although the mediation occurred before formal fact discovery began," there had been "significant informal discovery," which ensured that "the parties were well-positioned to mediate their claims." *Radosti v. Envision EMI, LLC*, 717 F.Supp.2d 37, 56 (D.D.C. 2010); *see also Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) (explaining that "formal discovery is not . . . required even for final approval of a proposed settlement" if "significant factual investigation [had been] made prior to negotiating a settlement"). "[T]he parties reached a settlement only after a lengthy mediation session that was presided over by an experienced mediator," *Radosti*, 717 F.Supp.2d at 56, and the settlement was approved by DOJ leadership and the judiciary's administrative body. Even in the ordinary case, where a settlement is "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery," without government involvement, there is a "presumption of fairness, adequacy, and reasonableness." *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019). The presumption here is at least as strong.

C. The settlement relief provided to class members is exceptional—particularly given the costs, risks, and delays of further litigation.

The third and "most important factor" examines "how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman*, 454 F. Supp.

2d at 9–10. This factor focuses in particular on "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2); *see also In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d at 16.

The relief provided to class members is remarkable. The total value of the settlement is $125 million, and every class member will be fully reimbursed, up to $350, for all PACER fees that they paid during the Class Period. Those who paid more than $350 in fees during the Class Period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. Further, any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (capped at the total amount of fees that each class member paid during the Class Period). Because most class members paid less than $350 during the Class Period, the average class member will receive a full refund of all fees paid. This relief will also be provided in a highly efficient manner—through a common-fund settlement in which class members will not have to submit any claim or make any attestation to receive payment. Agreement ¶ 16.

This would be an excellent outcome for the class even if it were achieved after trial, but it is especially good given the significant costs, risks, and delays posed by pursuing further litigation against the federal court system. The $125 million common fund represents nearly 70% of the total expenditures determined by the Federal Circuit to have been unlawfully funded with PACER fees during the Class Period. Without a settlement, the case would be headed for years of litigation and likely another appeal, with no guarantee that the class would wind up with any recovery given the government's remaining argument against liability (that the plaintiffs could not prove that PACER fees would have been lower—or by how much—but for the unlawful expenditures). Although the plaintiffs and class counsel believe that the government's argument is incorrect (and further, that

the AO should be liable for some portion of the CM/ECF expenses), the uncertainty and complete lack of case law on this issue counsel in favor of compromise. Add to that the benefits provided by avoiding protracted litigation and time-and-resource-intensive discovery into the remaining issues, and this is a superb recovery for the class.

The settlement's provision for attorneys' fees and service awards is also reasonable. The settlement provides that the total amount requested in service awards, administrative costs, and attorneys' fees will be no more than 20% of the aggregate amount of the common fund; and that "the Court will ultimately determine whether the amounts requested are reasonable." *Id.* ¶¶ 18, 28. The settlement further provides that the plaintiffs will request service awards of no more than $10,000 per class representative. *Id.* ¶ 28.

This Court will have the opportunity to assess the reasonableness of any requested award once it is made. For now, it is enough to note that these provisions ensure that class counsel will request an amount in fees that is reasonable relative to the relief they obtained for the class. *See In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98 (D.D.C. 2013) (Friedman, J.) ("[A] majority of common fund class action fee awards fall between twenty and thirty percent," and "even in megafund cases involving recoveries of $100 million or more, fees of fifteen percent are common.").

D. The settlement agreement treats class members equitably relative to each other.

The fourth factor examines whether the settlement treats class members equitably vis-à-vis one other. The settlement here does so. It reimburses every class member for up to $350 in fees paid during the Class Period and distributes the remaining funds in a way that is proportional to the overcharges paid by each class member. This formula for calculating payments is reasonable under the circumstances of this case. It advances the AO's longstanding policy goal of expanding public access for the average PACER user and, in doing so, approximates how the AO likely would

have chosen to reduce PACER fees during the Class Period had it been acting under a proper understanding of the law. Indeed, following this Court's summary-judgment decision, the AO doubled the size of the quarterly fee waiver, from $15 to $30. Gupta Decl. ¶ 20. Had it done the same over the Class Period, the total fee waiver available to all PACER users would have increased by $480. Reimbursing every PACER user for up to $350 in fees paid, with pro rata distributions to any users who paid more than that amount, is therefore fully in keeping with the AO's fee policy and a reasonable allocation of damages. The minimum payments also make it likelier that class members will collect their payments, thereby maximizing recovery to the class.

In addition, the settlement is equitable in allowing the class representatives to seek service awards of up to $10,000, while recognizing that this Court has discretion to award a smaller amount (or no award at all). *See Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012); *Abraha v. Colonial Parking, Inc.*, 2020 WL 4432250, at *6 (D.D.C. July 31, 2020) (preliminarily approving settlement where "all parties will receive payments according to the same distribution plan and formulas, except for a relatively small additional payment" of $15,000 per named plaintiff "to compensate them for their time and effort in this litigation"). Service awards "are not uncommon in common-fund-type class actions and are used to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011). The three nonprofits that prosecuted this case have been actively engaged in the litigation for more than six years—preparing declarations, receiving case updates, spending countless hours reviewing drafts and giving substantive feedback, and weighing in throughout the negotiation process, helping to produce a better outcome for all class members. Given their extraordinary contributions, it would be inequitable *not* to compensate them for their service.

E. The plaintiffs and class counsel support the settlement.

The final relevant factor is not enumerated in the text of Rule 23, but it is well-settled in the case law. Under this Court's cases, "the opinion of experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *Prince v. Aramark Corp.*, 257 F. Supp. 3d 20, 26 (D.D.C. 2017). Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F.Supp.2d 105, 121 (D.D.C. 2007).

III. The notice and notice programs will provide class members the best notice practicable under the circumstances.

Due process requires that notice to class members be "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950). Rule 23(e)(1) similarly requires that notice be directed in a "reasonable manner to all class members who would be bound by the proposal." The proposed notice meets these requirements. It describes the lawsuit in plain English, including the key terms of the settlement, the procedures for objecting to it, and the date of the fairness hearing. Agreement ¶ 29. The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018—will also inform them of their right to opt out and the procedures through which they may exercise that right. Proposed Notice Plan ¶ 7. Further, the notices will be distributed in a way that is designed to reach all class members: publication notice in the electronic newsletters of American Bankers Association, *Banking Journal*, *The Slant*, and a press release distributed via Cision PR Newswire; email notice to all class members for whom the AO has an email address on file; and postcard notice to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Agreement

¶ 29; Proposed Notice Plan ¶¶ 2, 3, 6. Relevant case documents will also be available on the settlement website. Agreement ¶ 29; Proposed Notice Plan ¶ 4.

CONCLUSION

This Court should grant the revised motion for preliminary approval and enter the proposed order.

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

William H. Narwold
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

Meghan S.B. Oliver
Charlotte E. Loper
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

April 12, 2023

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civ. A. No. 16-0745 (PLF)

CLASS ACTION SETTLEMENT AGREEMENT

For the purpose of disposing of the plaintiffs' claims in this case without any further judicial proceedings on the merits and without there being any trial or final judgment on any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose except as provided herein, the parties stipulate and agree as follows:

Background and Definitions

1. The plaintiffs challenge the lawfulness of fees charged by the federal government to access to records through the Public Access to Court Electronic Records program or "PACER." The lawsuit claims that the fees are set above the amount permitted by statute and seeks monetary relief under the Little Tucker Act, 28 U.S.C. § 1346(a) in the amount of the excess fees paid. The government contends that all such fees are lawful.

2. The complaint was filed on April 21, 2016. ECF No. 1. On January 24, 2017, this Court certified a nationwide class under Federal Rule of Civil Procedure ("Rule") 23(b)(3) and a single class claim alleging that PACER fees exceeded the amount authorized by statute and seeking

recovery of past overpayments. ECF Nos. 32, 33. The Court also appointed Gupta Wessler PLLC and Motley Rice LLC (collectively, "Class Counsel") as co-lead class counsel. *Id.*

3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018 ("the Class Period"). Excluded from that class are: (i) entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

4. The class originally certified by this Court consists only of individuals and entities who paid fees for use of PACER between April 21, 2010, and April 21, 2016 (with the same three exceptions noted in the previous paragraph). Plaintiffs who were not included in that original class definition—that is to say, PACER users who were not included in the original class and who paid fees for use of PACER between April 22, 2016, and May 31, 2018—shall be provided with notice of this action and an opportunity to opt out of the class.

5. On April 17, 2017, the Court entered an order approving the plaintiffs' proposed plan for providing notice to potential class members. ECF No. 44. The proposed plan designated KCC as Class Action Administrator ("Administrator"). Notice was subsequently provided to all Class Members included in the original class, and they had until July 17, 2017, to opt out of the class, as explained in the notice and consistent with the Court's order approving the notice plan. The notice referenced in paragraph 4 above shall be provided by the Administrator.

6. On March 31, 2018, the Court issued an opinion on the parties' cross-motions for summary judgment on liability. ECF No. 89; *see Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 126 (D.D.C. 2018). While briefing cross-motions on liability, the parties "reserv[ed] the damages determination for" a later point "after formal discovery." *Id.* at 138.

7. On August 13, 2018, the Court certified its March 31, 2018, summary-judgment decision for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(b). ECF Nos. 104,

105; *see Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018).

8. On August 6, 2020, the Federal Circuit affirmed this Court's decision on the parties' motions for summary judgment and remanded the case to this Court for further proceedings. *See Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1343 (Fed. Cir. 2020).

9. Following the Federal Circuit's decision, the parties agreed to engage in mediation to discuss the possibility of settling Plaintiffs' claims. On December 29, 2020, this Court stayed the proceedings through June 25, 2021, and it has repeatedly extended that stay since then as the parties have made progress on negotiating a global settlement.

10. On May 3, 2021, the parties participated in a day-long private mediation session in an attempt to resolve Plaintiffs' claims. Since then, the parties have engaged in numerous follow-up conversations via phone and email to come to an agreement on resolving the claims.

Common Fund Payment and Release

11. Plaintiffs have offered to settle this action in exchange for a common-fund payment by the United States in the total amount of one hundred and twenty-five million dollars ($125,000,000.00) (the "Aggregate Amount") inclusive of monetary relief for Plaintiffs' claims, interest, attorney fees, litigation expenses, administration costs, and any service awards to Class Representatives. Subject to this Court's approval, as set forth in paragraph 33, Plaintiffs' offer has been accepted by the United States.

12. Following the Court's order granting final approval of the settlement, as described in the "Fairness Hearing" portion of this agreement, and only after the appeal period for that order has expired, the United States shall pay the Aggregate Amount to the Administrator for deposit in the Settlement Trust, as referenced in paragraph 16.

13. Upon release of the Aggregate Amount from the U.S. Department of the Treasury's Judgment Fund, Plaintiffs and all Class Members release, waive, and abandon, as to the United States, its political subdivisions, its officers, agents, and employees, including in their official and individual capacities, any and all claims, known or unknown, that were brought or could have been brought against the United States for purported overcharges of any kind arising from their use of PACER during the Class Period. This release does not cover any claims based on PACER usage after May 31, 2018, nor any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). But the amount of settlement funds disbursed to any Class Member in this case shall be deducted in full from any monetary recovery that the Class Member may receive in *Fisher*. The Administrative Office of the U.S. Courts ("Administrative Office") represents that, apart from *Fisher*, it is aware of no other pending PACER-fee lawsuit pertaining to claims based on PACER usage on or before May 31, 2018.

Information

14. Within 30 days of a final order approving the settlement, Class Counsel shall provide to the Administrative Office the PACER account numbers of Class Counsel and all individuals who have opted out of the Class. Within 90 days of a final order approving the settlement, the Administrative Office shall make available to the Administrator the records necessary to determine the total amount owed to each Class Member, and the last known address or other contact information of each Class Member contained in its records. Should the Administrative Office need more than 90 days to do so, it will notify the Administrator and Class Counsel and provide the necessary information as quickly as reasonably possible. The Administrator shall bear sole responsibility for making payments to Class Members, using funds drawn from the Settlement Trust, as provided below. In doing so, the Administrator will use the data that the Administrative Office

currently possesses for each Class Member, and the United States shall be free of any liability based on errors in this data (*e.g.*, inaccurate account information, incorrect addresses, etc.).

15. The PACER account information provided in accordance with the previous paragraph shall be provided pursuant to the terms of the Stipulated Protective Order issued in this lawsuit on April 3, 2017 (ECF No. 41) as modified to encompass such information and shall be subject to the terms of the Stipulated Protective Order. The parties agree to jointly request that the Court extend the Stipulated Protective Order to encompass such information prior to the 90-day period set forth in the previous paragraph.

Disbursement of the Aggregate Amount

16. The Administrator shall establish a Settlement Trust, designated the "PACER Class Action Settlement Trust," to disburse the proceeds of the settlement. The administration and maintenance of the Settlement Trust, including responsibility for distributing the funds to Class Members using methods that are most likely to ensure that Class Members receive the payments, shall be the sole responsibility of the Administrator. Class Members will not be required to submit a claim form or make any attestation to receive their payments. The only obligation of the United States in connection with the disbursement of the Aggregate Amount will be: (i) to transfer the Aggregate Amount to the Administrator once the Court has issued a final order approving the settlement and the appeal period for that order has expired, and (ii) to provide the Administrator with the requisite account information for PACER users, as referenced in paragraph 14. The United States makes no warranties, representations, or guarantees concerning any disbursements that the Administrator makes from the Settlement Trust, or fails to make, to any Class Member. If any Class Member has any disagreement concerning any disbursement, the Class Member shall resolve any such concern with the Administrator.

17. The Settlement Trust is intended to be an interest-bearing Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1. The Administrator shall be solely responsible for filing all informational and other tax returns as may be necessary. The Administrator shall also be responsible for causing payments to be made from the Settlement Trust for any taxes owed with respect to the funds held by the Settlement Trust. The Administrator shall timely make all such elections and take such other actions as are necessary or advisable to carry out this paragraph.

18. As approved by the Court, the Administrator shall disburse the proceeds of the settlement as follows: The Administrator shall retain from the Settlement Trust all notice and administration costs actually and reasonably incurred, which includes actual costs of publication, printing, and mailing the notice, as well as the administrative expenses actually incurred and fees reasonably charged by the Administrator in connection with providing notice and processing the submitted claims. The Administrator shall distribute any service awards approved by the Court to the named plaintiffs, and any attorney fees and costs approved by the Court to Class Counsel, as set forth in the "Fairness Hearing" portion of this agreement. After the amounts for attorney fees, expenses, service awards, and notice and administration costs have been paid from the Aggregate Amount, the remaining funds shall be distributed to the class ("Remaining Amount"). The Remaining Amount shall be no less than 80% of the Aggregate Amount, or $100,000,000.

19. ***First Distribution.*** The Administrator shall allocate the Remaining Amount among Class Members as follows: First, the Administrator shall allocate to each Class Member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that Class Member for use of PACER during the Class Period. Second, the Administrator shall add together each minimum payment amount for each Class Member, which will produce the Aggregate Minimum Payment Amount. Third, the Administrator shall then deduct the Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata (based on the

amount of PACER fees paid in excess of $350 during the Class Period) to all Class Members who paid more than $350 in PACER fees during the Class Period.

20. Thus, under the formula for the initial allocation: (a) each Class Member who paid a total amount less than or equal to $350 in PACER fees for use of PACER during the Class Period would receive a payment equal to the total amount of PACER fees paid by that Class Member for PACER use during the Class Period; and (b) each Class Member who paid more than $350 in PACER fees for use of PACER during the Class Period would receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount.

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 90 days of receipt of the Aggregate amount, or within 21 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

22. The Administrator shall keep an accounting of the disbursements made to Class Members, including the amounts, dates, and outcomes (*e.g.*, deposited, returned, or unknown) for each Class Member, and shall make all reasonable efforts, in coordination with Class Counsel, to contact Class Members who do not deposit their payments within 90 days of the payment being made to them.

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust one year after the United States has made the payment set forth in paragraph 12, those funds ("the Remaining Amount After First Distribution") shall be distributed to

Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed following one year after the United States has made the payment set forth in paragraph 12 shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel

One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

24. Class Members who are eligible to receive a second distribution shall have three months from the time of the distribution to deposit or otherwise collect their payments. If, after this three-month period expires, unclaimed or undistributed funds remain in the Settlement Trust, those funds shall revert unconditionally to the U.S. Department of the Treasury. Upon expiration of this three month period, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the addresses referenced in paragraph 23 of this reverter. Instructions to effectuate the reverter will be provided to the Administrator following receipt of such notice, and the Administrator agrees to promptly comply with those instructions. The three-month period will run for all Class Members eligible to receive a second distribution from the date the earliest distribution is made of a second distribution to any Class Member eligible for such a distribution. Upon request, the Administrator will notify the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office of the date the three-month period commenced. To the extent a payment in connection with the Second Distribution is made to a Class Member by the Administrator by check, any check that remains uncashed following this three-month period shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for reverter to the United States.

25. The Class Representatives have agreed to a distribution structure that may result in a reverter to the U.S. Treasury for purposes of this settlement only.

26. Neither the parties nor their counsel shall be liable for any act or omission of the Administrator or for any mis-payments, overpayments, or underpayments of the Settlement Trust by the Administrator.

Fairness Hearing

27. As soon as possible and in no event later than 60 days after the execution of this agreement, Class Counsel shall submit to the Court a motion for an Order Approving Settlement Notice to the Class under Rule 23(e). The motion shall include (a) a copy of this settlement agreement, (b) the proposed form of the order, (c) the proposed form of notice of the settlement to be mailed to Class Members and posted on an internet website dedicated to this settlement by the Administrator, and (d) the proposed form of notice to be mailed to Class Members who were not included in the original class definition certified by the Court on January 24, 2017, as discussed in paragraph 4, and posted on the same website, advising them of their right to opt out. The parties shall request that a decision on the motion be made promptly on the papers or that a hearing on the motion be held at the earliest date available to the Court.

28. Under Rule 54(d)(2), and subject to the provisions of Rule 23(h), Plaintiffs will apply to the Court for an award of attorney fees and reimbursement of litigation expenses, and for service awards for the three Class Representatives in amounts not to exceed $10,000 per representative. These awards shall be paid out of the Aggregate Amount. When combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable. The United States reserves its right, upon submission of Class Counsel's applications, to advocate before the Court for the use of a lodestar cross-check in determining the fee award, and for a lower service award for the Class Representatives should Plaintiffs seek more than $1,000 per representative. Plaintiffs' motion for an award of attorney fees and litigation expenses shall be subject to the approval of the Court and notice of the motion shall be provided to Class Members informing them of the request and their right to object to the motion, as required by Rule 23(h).

29. Within 30 days of the Court's entry of the Order Approving Settlement Notice to the Class, the Administrator shall mail or cause to be mailed the Notice of Class Action Settlement by email or first-class mail to all Class Members. Contemporaneous with the mailing of the notice and continuing through the date of the Fairness Hearing, the Administrator shall also display on an internet website dedicated to the settlement the relevant case documents, including the settlement notice, settlement agreement, and order approving the notice. The Notice of Class Action Settlement shall include an explanation of the procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" under Rule 23(e), and the date by which Class Members must file their written objections, if any, to the settlement.

30. Any Class Member may express to the Court his or her views in support of, or in opposition to, the fairness, reasonableness, and adequacy of the proposed settlement. If a Class Member objects to the settlement, such objection will be considered only if received no later than the deadline to file objections established by the Court in the Order Approving Settlement Notice to the Class. The objection shall be filed with the Court, with copies provided to Class Counsel and counsel for the United States, and the objection must include a signed, sworn statement that (a) identifies the case number, (b) describes the basis for the objection, including citations to legal authority and evidence supporting the objection, (c) contains the objector's name, address, and telephone number, and if represented by counsel, the name, address, email address, and telephone number of counsel, and (d) indicates whether objector intends to appear at the Fairness Hearing.

31. Class Counsel and counsel for the United States may respond to any objection within 21 days after receipt of the objection.

32. Any Class Member who submits a timely objection to the proposed settlement may appear in person or through counsel at the Fairness Hearing and be heard to the extent allowed by the Court. Any Class Members who do not make and serve written objections in the manner

provided in paragraph 30 shall be deemed to have waived such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

33. After the deadlines for filing objections and responses to objections have lapsed, the Court will hold the Fairness Hearing at which it will consider any timely and properly submitted objections made by Class Members to the proposed settlement. The Court will decide whether to approve the settlement and enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. The parties shall request that the Court schedule the Fairness Hearing no later than 150 days after entry of the Court's Order Approving Settlement Notice to the Class.

34. If this settlement is not approved in its entirety, it shall be void and have no force or effect.

Miscellaneous Terms

35. This agreement is for the purpose of settling Plaintiffs' claims in this action without the need for further litigation, and for no other purpose, and shall neither constitute nor be interpreted as an admission of liability on the part of the United States.

36. Each party fully participated in the drafting of this settlement agreement, and thus no clause shall be construed against any party for that reason in any subsequent dispute.

37. In the event that a party believes that the other party has failed to perform an obligation required by this settlement agreement or has violated the terms of the settlement agreement, the party who believes that such a failure has occurred must so notify the other party in writing and afford it 45 days to cure the breach before initiating any legal action to enforce the settlement agreement or any of its provisions.

38. The Court shall retain jurisdiction for the purpose of enforcing the terms of this settlement agreement.

39. Plaintiffs' counsel represent that they have been and are authorized to enter into this agreement on behalf of Plaintiffs and the class.

40. Undersigned defense counsel represents that he has been authorized to enter into this agreement by those within the Department of Justice with appropriate settlement authority to authorize the execution of this agreement.

41. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

<REMAINDER OF PAGE LEFT BLANK; SIGNATURES PAGES TO FOLLOW>

AGREED TO ON BEHALF OF PLAINTIFFS:

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
Meghan S.B. Oliver (D.C. Bar No. 493416)
Elizabeth Smith (D.C. Bar No. 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 1001
Washington, DC 20004
(202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: 07/27/2022

Appx3990
Case: 24-1757 Document: 32-2 Page: 122 Filed: 12/06/2024 (573 of 1275)

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 7-12-22
JEREMY S. SIMON, D.C. BAR #447956 Dated
Assistant United States Attorney
601 D. Street, NW
Washington, DC 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 16-0745 (PLF)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION AND FIRST AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 3 of the Agreement shall be replaced with the following language:

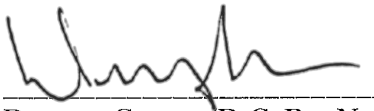
> 3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period") regardless of when such persons or entities used the PACER system. Excluded from that class are: (i) persons or entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

In addition, the parties agree that the phrases "who paid PACER fees between [date x] and [date y]" and "who paid fees for use of PACER between [date x] and [date y]," as used in paragraphs 3 and 4 of the Agreement, refer to the payment of PACER fees in the specified period rather than the use of PACER in the specified period. The parties further agree that each specified period in those paragraphs includes both the start and end dates unless otherwise specified.

Finally, in paragraph 27 of the Agreement, the parties agree that the reference to "60 days" shall be changed to "75 days."

The remainder of Agreement remains unchanged by this Stipulation and Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:



DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MEGHAN S. B. OLIVER (D.C Bar No. 493416)
ELIZABETH SMITH (D.C. Bar No 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 630
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: September 29, 2022

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 9-29-22

JEREMY S. SIMON, D.C. Bar No. 447956 Dated
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 16-0745 (PLF)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION AND SECOND AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Second Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 21 of the Agreement shall be replaced with the following language:

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 180 days of receipt of the Aggregate amount, or within 180 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

Paragraph 23 of the Agreement shall be replaced with the following language:

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust 180 days after the Administrator has made the distribution described in paragraph 21, those funds ("the Remaining Amount After

First Distribution") shall be distributed to Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed 180 days after the Administrator has made the distribution described in paragraph 21, shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel
One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

The remainder of Agreement remains unchanged by this Stipulation and Second Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MEGHAN S. B. OLIVER (D.C Bar No. 493416)
ELIZABETH SMITH (D.C. Bar No 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 630
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: 04-12-23

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 4-11-23
DEREK S. HAMMOND, D.C. Bar No. 1017784 Dated
Assistant United States Attorney
601 D Street, NW
Washington, D.C. 20530
(202) 252-2511
Derek.Hammond@usdoj.gov

Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 1:16-cv-00745-PLF

ORDER GRANTING PLAINTIFFS' REVISED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

After considering Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement ("Plaintiffs' Motion"),

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion is GRANTED.

2. After a preliminary review, the Settlement appears to be fair, reasonable, and adequate. The Settlement: (a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risk, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class of individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, but also a proposed additional Settlement Class of individuals and entities who paid PACER fees between April 22, 2016 and May 31, 2018; (d) does not provide undue preferential treatment to Class Representatives or to segments of the Class; (e) does not provide excessive compensation to counsel for the Class; and (f) is therefore sufficiently fair, reasonable, and adequate to warrant providing notice of the Settlement

to the Class. Accordingly, the Court preliminarily approves the Settlement, subject to further consideration at the Settlement Hearing described below.

3. A hearing (the "Settlement Hearing") shall be held before this Court on October 12, 2023, at 10:00 a.m. in the Ceremonial Courtroom (Courtroom 20) at the United States District Court for the District of Columbia, 333 Constitution Avenue NW, Washington D.C. 20001 for the following purposes:

a. to determine whether the Settlement is fair, reasonable, and adequate, and should be approved by the Court;
b. to determine whether judgment should be entered, dismissing the Complaint on the merits and with prejudice;
c. to consider the fee and expense application;
d. to consider Class Members' objections to the Settlement, or the application for fees and expenses, if any;
e. to rule upon such other matters as the Court may deem appropriate.

4. The Court may adjourn the Settlement Hearing without further notice to the members of the Class, and reserves the right to approve the Settlement with such modifications as may be agreed upon or consented to by the parties and without further notice to the Class where to do so would not impair Class Members' rights in a manner inconsistent with Rule 23 and due process of law. The Court further reserves the right to enter its judgment approving the Settlement, and dismissing the Complaint on the merits and with prejudice regardless of whether it has approved the fee and expense application.

5. The Court will consider comments or objections to the Settlement or the request for fees and expenses, only if such comments or objections and any supporting papers are submitted to the Court at least thirty days prior to the Settlement Hearing according to the procedure described in the website notice. Attendance at the Settlement Hearing is not necessary, but any person wishing to be heard orally in opposition to the Settlement is required to indicate in their written objection whether they intend to appear at the Settlement Hearing.

6. All opening briefs and documents in support of the Settlement and any fee and expense application, shall be filed no later than forty-five days before the Settlement Hearing. Replies to any objections shall be filed at least nine days prior to the Settlement Hearing.

7. The revised Settlement Class satisfies Rule 23 and is certified for the same reasons set forth in the Court's prior class certification order. The Settlement Class is defined as:

> All persons or entities who paid PACER Fees between April 21, 2010 and May 31, 2018, excluding persons or entities that have already opted out, federal agencies, and Class Counsel.

8. The notice documents advising the previously certified Class Members ("Initial Class Members") of the Settlement are hereby approved as to form and content. Exhibit 1 (2010-2016 email notice); Exhibit 3 (2010-2016 postcard notice).

9. The notice documents advising the Additional Class Members of the Settlement and providing for opt-out rights are hereby approved as to form and content. Exhibit 2 (2016-2018 email notice); Exhibit 4 (2016-2018 postcard notice).

10. The long-form website notice advising the Class Members of the Settlement and providing for opt-out rights for the Additional Class Members is hereby approved as to form and content. Exhibit 5.

11. The publication notice advising the Class Members of the Settlement and providing for opt-out rights for the Additional Class Members is hereby approved as to form and content. Exhibit 6.

12. The firm of KCC Class Action Services LLC ("KCC" or "Administrator") is appointed to supervise and administer the notice procedure.

13. To the extent they are not already produced, within fourteen days from the entry of this order, Defendant shall produce to Plaintiffs the names, postal addresses, email addresses, phone

numbers, PACER-assigned account numbers, and firm name of all individuals or entities with a PACER account that paid PACER fees during the class period ("Notice Data"). For purposes of this paragraph, "individuals and entities" is defined as all PACER users except the following: (1) any user who, during the quarter billed, is on the master Department of Justice list for that billing quarter; (2) any user with an @uscourts.gov email address extension; or (3) any user whose PACER bill is sent to and whose email address extension is shared with a person or entity that received PACER bills for more than one account, provided that the shared email address extension is one of the following: @oig.hhs.gov, @sol.doi.gov, @state.gov, @bop.gov, @uspis.gov, @cbp.dhs.gov, @ussss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov.[1]

14. Within thirty days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall provide the publication notice, in substantially the same form as Exhibit 6, to American Bankers Association ("ABA"), *Banking Journal, The Slant,* and Cision PR Newswire for publication.

15. Within thirty days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall cause the email notices to be disseminated, in substantially the same form as Exhibits 1 and 2, by sending them out via email to all Class Members. The Initial Class Members will be emailed Exhibit 1. The Additional Class Members will be emailed Exhibit 2. The email notices shall direct Class Members to a website maintained by the Administrator. The sender of the email shall appear to recipients as "PACER

[1] For example, accounting@dol.gov at 200 Constitution Avenue, NW, Washington, DC 20210 receives bills for johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov. None of those email addresses (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

Fees Class Action Administrator," and the subject line of the email shall be "PACER Fees – Notice of Class Action Settlement."

16. Contemporaneous with the emailing of the notices and continuing through the date of the Settlement Hearing, the Administrator shall display on the internet website dedicated to this case, www.pacerfeesclassaction.com, the long-form notice in substantially the same form as Exhibit 5. The Administrator shall continue to maintain the website and respond to inquiries by Class Members as necessary. The website will include the printable Exclusion Request form, the online Exclusion Request form, Plaintiffs' Class Action Complaint, Defendant's Answer, the Order on the Motion for Class Certification, the Memorandum Opinion on the Motion for Class Certification, the District Court's summary judgment opinion, the Federal Circuit's summary judgment opinion, the Settlement Agreement, this order, and any other relevant documents. The website will include the ability for Class Members to check the status of their refund check if the Court grants final approval of the settlement and update their mailing address. The website will also allow accountholders to notify the Administrator that an entity paid PACER fees on their behalf, and will allow payers to notify the Administrator that they paid PACER fees on an accountholder's behalf. These changes must be made on the website no later than 60 days after dissemination of email notice.

17. Within thirty days from the entry of this order, the Administrator shall make available to Class Members telephone support to handle any inquiries from Class Members.

18. Within forty-five days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall cause the postcard notices to be disseminated, in substantially the same form as Exhibits 3 and 4 by sending them out via U.S. mail to all Class Members: (1) without an email address; or (2) for whom email delivery was unsuccessful. The Initial Class Members will be mailed Exhibit 3. The Additional Class Members will be mailed

Exhibit 4. The postcard notices will direct Class Members to the website maintained by the Administrator.

19. Additional Class Members can ask to be excluded from the settlement by: (1) sending an Exclusion Request in the form of a letter; (2) completing and submitting the online Exclusion Request form; or (3) sending an Exclusion Request form by mail. Ninety days after the entry of this order, the opt-out period for the Additional Class Members will expire.

20. Class Members can object to the Settlement or the request for fees and expenses by submitting their comments or objections and any supporting papers to the United States District Court for the District of Columbia according to the procedure described in the website notice. Such comments or objections must be submitted at least thirty days prior to the settlement hearing. Any response by the United States to Plaintiffs' request for fees and expenses, as reserved in paragraph 28 of the Settlement Agreement, must be submitted at least thirty days prior to the settlement hearing.

21. The Court finds that the dissemination of the notice under the terms and in the forms provided for constitutes the best notice practicable under the circumstances, that it is due and sufficient notice for all purposes to all persons entitled to such notice, and that it fully satisfies the requirements of due process and all other applicable laws.

IT IS SO ORDERED.

5/8/23
Date

Paul L. Friedman
The Honorable Paul L. Friedman
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-PLF

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER LLP
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

MEGHAN S.B. OLIVER
CHARLOTTE E. LOPER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

August 28, 2023

TABLE OF CONTENTS

Attachments

1. Declaration of Renee Burbank, National Veterans Legal Services Program
2. Declaration of Stuart T. Rossman, National Consumer Law Center
3. Declaration of Rakim Brooks, Alliance for Justice

4. Declaration of Brian Fitzpatrick
5. Declaration of Deepak Gupta, Gupta Wessler LLP
6. Declaration of Meghan Oliver, Motley Rice LLC
7. Declaration of Gio Santiago, KCC Class Action Services
8. Proposed Order

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

The plaintiffs ask the Court to grant final approval of this historic class-action settlement. Since the Court granted preliminary approval on May 8, 2023, the claims administrator has carried out the Court-approved notice program, sending individualized notice to approximately 500,000 class members and providing publication notice as well. The reception so far has been almost universally positive: As of this filing, the administrator has received only one objection and 34 valid opt-out requests. *See* KCC Decl. ¶ 21. The plaintiffs will update the Court on the number of opt-outs and objections, and respond to any additional objections, no later than October 3.

This settlement brings to an end a case that has generated more than seven years of hard-fought litigation, and that is unique in American history: a certified class action against the federal judiciary, concerning the fees that the judiciary charges for access to records through the Public Access to Court Electronic Records system, or PACER. Under the settlement, the government must reimburse the vast majority of PACER users in full—100 cents on the dollar—for past PACER charges. The settlement creates a common fund of $125 million from which each class member will automatically be reimbursed up to $350 for any PACER fees paid between April 21, 2010, and May 31, 2018. Those who paid over $350 in fees during that period will receive their pro rata share of the remaining settlement funds. Any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (subject to the caveat that no class members may receive more than the total fees that they actually paid). In addition to this remarkable monetary relief, the case has spurred the judiciary to eliminate fees for 75% of users going forward and prompted action in Congress to abolish the fees altogether.

By any measure, this litigation has been an extraordinary achievement—and even more so given the odds stacked against it. PACER fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until

this case was filed, litigation wasn't seen as a realistic path to reform. That was for three reasons. First, the judiciary has statutory authority to charge at least *some* fees, so litigation alone could never result in a free PACER system. Second, few lawyers experienced in complex federal litigation would be willing to sue the federal judiciary—and spend considerable time and resources challenging decisions made by the Judicial Conference of the United States—with little hope of payment. Third, even if PACER fees could be shown to be excessive and qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. A lawsuit challenging PACER fees had been dismissed for lack of jurisdiction, and advocates had been unable for years to identify an alternative basis for jurisdiction, a cause of action, and a statutory waiver of sovereign immunity. So they devoted their efforts to other strategies: making some records freely available in a separate database, downloading records in bulk, and mounting public-information campaigns.

These efforts were important, but they didn't challenge the lawfulness of PACER fees. Despite public criticism—and despite being reproached in 2009 and 2010 by Senator Lieberman, the sponsor of a 2002 law curtailing the judiciary's authority to charge fees—the Administrative Office of the U.S. Courts did not reduce PACER fees. Instead, the AO *increased* fees in 2012.

There things stood until 2016, when three nonprofits filed this suit under the Little Tucker Act, a post-Civil-War-era statute that "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996). Because the Act provides jurisdiction only for claims seeking money for past overpayments, the plaintiffs could not demand that the judiciary lower PACER fees going forward. They could seek only retroactive monetary relief.

Even with this built-in jurisdictional limitation, this lawsuit has been a resounding success. The plaintiffs defeated a motion to dismiss and obtained certification of a nationwide class by early

2017. Through discovery, they were then able to shine a light on how the AO had used the fees. Many things funded by the fees—such as flat screens for jurors—had nothing to do with PACER. This discovery in turn led to an unprecedented decision: In March 2018, this Court held that the AO had violated the law by using PACER fees to fund certain activities. Within months, the AO announced that these activities would "no longer be funded" with PACER fees. Gupta Decl. ¶ 18.

Success continued on appeal. In the Federal Circuit, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups, and the sponsor of the 2002 law"—all detailing the harms of high PACER fees. *See* Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times, Feb. 4, 2019, https://perma.cc/LN5E-EBE9. Media outlets published editorials championing the lawsuit. *See, e.g.*, *Public Records Belong to the Public*, N.Y. Times, Feb. 7, 2019, https://perma.cc/76P8-WFF7. And before long, the AO announced that it was doubling the $15 quarterly fee waiver for PACER, eliminating fees for approximately 75% of PACER users. Gupta Decl. ¶ 20. Then the plaintiffs secured a landmark Federal Circuit opinion unanimously affirming this Court's decision. *NVLSP v. United States*, 968 F.3d 1340 (Fed. Cir. 2020).

The litigation sparked widespread public interest in the need to reform PACER fees and jumpstarted legislative action that continues to this day. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22. The Judicial Conference, too, now supports legislation providing for free PACER access to noncommercial users. *Id.* Were Congress to enact such legislation into law, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone.

As for fees already paid—the claims at issue here—they will be refunded. Under the settlement, the average PACER user will be reimbursed for all PACER fees paid during the class period. And no class member will need to submit a claim to be paid.

This is an extraordinarily favorable result for the class, and it easily satisfies Rule 23(e)(2)'s criteria. This Court has already found that, on "a preliminary review," the settlement "appears to be fair, reasonable, and adequate" because it "(a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risks, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class" and an "additional Settlement Class"; "(d) does not provide undue preferential treatment to Class Representatives or to segments of the Class"; and "(e) does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1. Because a final review only confirms these findings, the plaintiffs respectfully request that the Court enter an order giving final approval to the settlement.

In addition, as authorized by the settlement, this motion seeks an award of attorneys' fees, settlement-administration and notice costs, litigation expenses, and service awards for the three class representatives in a total amount equal to 20% of the $125 million common fund. This request should be granted in full. The specific amounts sought are as follows: The motion seeks $29,654.98 in expenses because class counsel actually and reasonably incurred that amount to prosecute the case and achieve the settlement. The motion seeks $1,077,000 in settlement-administration and notice costs because the administrator initially agreed to perform its services for $977,000, and an additional $100,000 is needed due to unanticipated complexities. And the motion seeks an award of $10,000 per class representative to compensate them for their time working on the case and the responsibility that they have shouldered. Each of these requested amounts is reasonable. Class counsel seeks the remainder ($23,863,345.02) in attorneys' fees. This amount is approximately 19.1% of the common fund, which is below the average percentage fee awarded for funds of this size. Fitzpatrick Decl. ¶ 19. And the other factors that courts look to in assessing the reasonableness of a requested fee—including the degree of complexity and risk involved in the case, as well as the results obtained for the class—would, if anything, support a greater-than-average percentage here.

BACKGROUND

A. Factual and procedural background

1. The legal framework for PACER fees

By statute, the judiciary has long had authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then $.07 per page) were "higher than the marginal cost of disseminating the information," creating excess fee revenue that the judiciary had begun using to fund other projects. S. Rep. 107-174, at 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.*

To this end, Congress passed the E-Government Act of 2002, which amended the statute by adding the words "only to the extent necessary." 28 U.S.C. § 1913 note. Despite this limitation, the AO twice increased PACER fees in the years after the E-Government Act's passage—first to $.08 per page, and then to $.10 per page—during a time when the costs of electronic data storage plunged exponentially. Gupta Decl. ¶ 4. This widening disparity prompted the Act's sponsor, Senator Lieberman, to reproach the AO for charging fees that were "well higher than the cost of dissemination," "against the requirement of the E-Government Act." ECF No. 52-8 at 3; ECF No. 52-9 at 1.

Excessive PACER fees have inflicted harms on litigants and the public alike. Whereas the impact of excess fees on the judiciary's $7-billion annual budget is slight, these harms are anything but: High PACER fees hinder equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts. And the AO had further compounded the harmful effects of high fees in recent years by discouraging fee waivers, even for pro se litigants, journalists,

researchers, and nonprofits; by prohibiting the free transfer of information by those who obtain waivers; and by hiring private collection lawyers to sue people who could not afford to pay the fees.

2. District court proceedings

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this lawsuit. From the start, the plaintiffs were represented by an expert team drawn from the law firms of Gupta Wessler LLP, a litigation boutique with experience bringing complex cases against the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. The plaintiffs asked the Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges—the only relief available to them under the Little Tucker Act. *See* 28 U.S.C. § 1346(a). Because the judiciary is not subject to the APA, 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek injunctive relief requiring the AO to lower PACER fees in the future.

This Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF Nos. 24 & 25. A month later, in January 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' illegal-exaction Little Tucker Act claim for classwide treatment and appointed Gupta Wessler and Motley Rice as co-lead class counsel. *Id.*

The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (or KCC) as claims administrator. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, only about 1,100 opted out of the class. Gupta Decl. ¶ 14.

Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only what the judiciary

labeled as "Public Access Services," but also "Case Management/Electronic Case Files System" (or CM/ECF); "Electronic Bankruptcy Notification"; "Communications Infrastructure, Services, and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi [Study]."

Based on this discovery, the parties filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to disseminating information through electronic means.

In March 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [PACER] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "properly used PACER fees to pay for CM/ECF and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

In the months that followed, the AO took steps "to implement the district court's ruling" and "reduce potential future legal exposure." Gupta Decl. ¶ 18. It announced in July 2018 that these four categories would "no longer be funded" with PACER fees. *Id.* "The Judiciary will instead seek appropriated funds for those categories," as it does for over 98% of its budget. *Id.* A year later, the

AO announced that it was doubling the quarterly fee waiver for PACER—from $15 to $30—which had the effect of eliminating PACER fees for approximately 75% of PACER users. *Id.* ¶ 20.

3. Appellate proceedings

Both parties sought permission for an interlocutory appeal from this Court's decision, and the Federal Circuit accepted both appeals. The parties adhered to their same interpretations of the statute on appeal. The plaintiffs' position was supported by a broad array of amici curiae—a group of prominent retired federal judges, Senator Lieberman, media organizations, legal-technology firms, and civil-liberties groups from across the ideological spectrum—detailing the harms caused by high PACER fees. *See* Liptak, *Attacking a Pay Wall that Hides Public Court Filings*. In response, the government defended the full amount of PACER fees, while strenuously arguing that the court lacked jurisdiction under the Little Tucker Act.

The Federal Circuit rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP*, 968 F.3d at 1350. It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (those not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was a "potential source of liability" because the court could not confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The Federal Circuit left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

Following the Federal Circuit's decision, federal lawmakers swung into action. The House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22.

B. Mediation and settlement negotiations

On remand, the case was reassigned to Judge Friedman, and the parties came together to discuss the path forward. They understood that litigating the case to trial would entail significant uncertainty and delay. Gupta Decl. ¶ 23. Years of protracted litigation lay ahead. And the range of potential outcomes was enormous: On one side, the government argued that it owed zero damages to the class because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower (a litigating position that also made it difficult for the judiciary to lower fees while the case remained pending). *Id.* On the other side, the plaintiffs maintained that liability had already been established for four categories of expenses and that some portion of the CM/ECF expenditures were likely improper as well. *Id.*

Hoping to bridge this divide and avoid a lengthy delay, the parties were able to agree on certain structural aspects of a potential settlement and then agreed to engage in mediation on the amount and details. *Id.* ¶ 24. On December 29, 2020, at the parties' request, this Court stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation. *Id.*

Over the next few months, the parties exchanged information and substantive memoranda, which provided a comprehensive view of the strengths and weaknesses of the case. *Id.* ¶ 25. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, an experienced and accomplished mediator agreed upon by the parties. *Id.*

With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. *Id.* ¶ 26. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-

made settlement, and the plaintiffs agreed to consider the government's final offer concerning the total amount of that fund. *Id.* But by the time the session ended, the parties still hadn't agreed on the total amount of the common fund or other important terms—including how the money would be allocated and distributed to class members, what to do with any unclaimed funds after the initial distribution, and the scope of the release. *Id.* ¶ 27. Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were ultimately able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. *Id.* The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed. *Id.*

Further progress was slow, and at times the parties reached potentially insurmountable impasses. *Id.* ¶ 28. A particular sticking point concerned the allocation of settlement funds. *Id.* Consistent with the parties' litigating positions, the plaintiffs argued that funds should be distributed pro rata to class members, while the government argued for a large minimum amount per class member, which it maintained was in keeping with the AO's statutory authority (and longstanding policy) to "distinguish between classes of persons" in setting PACER fees "to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note; Gupta Decl. ¶ 28. Over a period of many months, the parties were able to resolve their differences and reach a compromise on these competing approaches: a minimum payment of $350—the smallest amount the government would agree to—with a pro rata distribution beyond that amount. *Id.*

The final version of the settlement was executed on July 27, 2022. *Id.* ¶ 28; Gupta Decl. Ex. A ("Agreement"). The parties executed an amendment in September 2022 making certain technical modifications to the agreement, and a second amendment in April 2023 making further technical modifications. Gupta Decl. Ex. B ("First Supp. Agreement") & Ex. C ("Second Supp. Agreement").

C. Overview of the settlement agreement

1. The settlement class

As clarified by the first supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the class period"), excluding opt-outs, federal agencies, and class counsel. Agreement ¶ 3; First Supp. Agreement. The class period does not go beyond May 31, 2018 because the AO stopped using PACER fees to fund the four categories of prohibited expenses after this date.

This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Agreement ¶ 4. Because people in this second group are not part of the original class, they did not receive notice or a right to opt out when the original class was certified. For that reason, under the settlement, these additional class members received notice and a right to opt out in 2023. *Id.*

2. The settlement relief

The settlement provides for a total common-fund payment by the United States of $125 million, which covers the monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11.

Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust. *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16.

3. The released claims

In exchange for the relief provided by the settlement, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the class period. *Id.* ¶ 13.[1]

4. Notice to settlement class and requests for exclusion

Over the past two months, KCC has sent court-approved settlement notice to over 500,000 PACER accountholders. KCC Decl. ¶¶ 8, 15. On July 6, it sent an initial batch of more than 336,000 email notices and over 100,000 postcard notices to those for whom email notice was not possible or successful. *Id.* ¶¶ 8–10. On August 7, KCC sent notice to an additional 184,478 accountholders who were inadvertently omitted from the first batch of notices. *Id.* ¶ 15. These 184,478 people were not prejudiced by the delay because they all received notice and opt-out rights in 2017, so they were not entitled to opt out of the settlement in 2023. Further, they all have 36 days to object to the settlement and 29 days to notify KCC that someone else paid PACER fees on their behalf. KCC also sent corrective notice on August 7 to an additional 53,446 accountholders who had received the wrong notice in the initial batch based on a data error. Instead of receiving notice providing only an opportunity to object to the settlement, and not also to opt out (which each of these accountholders had already been given in 2017), these accountholders received notice that mentioned an opportunity to opt out of the settlement. The corrective notice informed them of the mistake and included the court-approved text of the correct notice. *Id.* ¶ 16, Ex. G.

---

[1] This release excluded the claims that were then pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). Agreement ¶ 13. That unrelated case—which was voluntarily dismissed with prejudice on July 24, 2023—alleged that PACER overcharges users due to a systemic billing error concerning the display of some HTML docket sheets. The case did not challenge the PACER fee schedule and was not certified as a class action.

Of the approximately 500,000 PACER accountholders to whom settlement notice was sent, approximately 100,000 had an opportunity to request exclusion from the settlement class. *Id.* ¶¶ 8, 10. KCC has received a total of 50 exclusion requests (16 of which were invalid because they were submitted by individuals who had already a chance to opt out in 2017 or are federal employees who are excluded from the class definition). *Id.* ¶¶ 17, 21. Thirty-one of the 34 valid opt-out requests were received via the class website, while three were received by mail. *Id.* ¶ 21.

KCC also published notice in the *ABA Banking Journal eNewsletter* and distributed it via Cision PR Newswire. *Id.* ¶¶ 12–13. The press release has been posted in full 380 times online and on social media; has appeared on broadcast media, newspaper, and online news websites; and has also been posted on the class website at www.pacerfeesclassaction.com. *Id.* ¶¶ 12, 18.

5. Allocation and payment

Under the settlement, class members will not have to submit a claim to receive their payment. Agreement ¶¶ 4, 16. Instead, KCC will use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.* These efforts include (1) sending checks to class members using PACER payment data maintained by the government; (2) allowing class members to notify KCC that someone else paid PACER fees on their behalf and is the proper recipient of any settlement funds; and (3) allowing individuals or entities to notify KCC that they paid PACER fees on behalf of someone else and are the proper recipients of settlement funds. Agreement ¶¶ 3, 19; KCC Decl. ¶¶ 18, 22.

The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. Agreement ¶ 18. KCC will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class

members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to a total of $100 million.

First distribution. KCC will distribute the Remaining Amount to class members using the following formula: It will first allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. *Id.* ¶ 19. Next, KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* KCC will then deduct this Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the class period. *Id.*

Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the class period will receive a payment equal to the total amount of PACER fees paid by that class member during the class period; and (b) each class member who paid more than $350 in PACER fees during the class period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

KCC will complete disbursement of each class member's share of the recovery within 180 days of receiving the $125 million from the United States, or within 180 days of receiving the necessary information from AO, whichever is later. Second Supp. Agreement. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates, and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. Agreement ¶ 22.

Second distribution. If, despite these efforts, unclaimed or undistributed funds remain in the settlement trust one year after the $125 million payment by the United States, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. Second Supp. Agreement. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the class period and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the class period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. Agreement ¶ 24. Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. *Id.* If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

6. Service awards, attorneys' fees, and costs

As noted, the settlement authorizes the plaintiffs to request service awards of up to $10,000 per class representative and an award of attorneys' fees and litigation expenses, and for KCC to retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18, 28. The total amount requested in service awards, fees, expenses, and costs does not exceed 20% of the total common fund. *Id.* Any amounts awarded by the Court will be paid out of the common fund. *Id.* As required by Rule 23(h), Class Members have the right to object these requests. *Id.*

7. Further settlement-related proceedings

Any class member may express her views to the Court supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Agreement ¶ 30. Counsel for the parties may respond to any objection within 21 days of receiving the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32.

After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing, during which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Agreement ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.* The Court has scheduled the fairness hearing for October 12, 2023.

Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, along with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41), the extension of which the parties will be jointly requesting from this Court. Agreement ¶ 14. After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

ARGUMENT

I. Because the settlement provides an exceptional recovery for the class, the Court should approve the settlement.

Rule 23(e) requires court approval of a class-action settlement. This entails a "three-stage process, involving two separate hearings." *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 189–90

(D.D.C. 2017) (cleaned up). Before the Court may approve a class-action settlement, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, requires that the settlement be "fair, reasonable, and adequate."

The settlement in this case has advanced past the first and second stages, with this Court having preliminarily approved it and notice having now been provided to the class. The third stage involves a fairness hearing during which the Court examines the settlement and any objections to it, followed by a decision on whether to approve the settlement. *Ross*, 267 F. Supp. 3d at 190.

In considering whether to give final approval to a settlement, the court's discretion is constrained by the "long-standing judicial attitude favoring class action settlements" and "the principle of preference favoring and encouraging settlement in appropriate cases." *Rogers v. Lumina Solar, Inc.*, 2020 WL 3402360, at *4 (D.D.C. June 19, 2020) (Brown, J.); see *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 16 (D.D.C. 2019) ("Class action settlements are favored as a matter of public policy."); *United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) ("Settlement is highly favored."); *Ciapessoni v. United States*, 145 Fed. Cl. 685, 688 (2019) ("Settlement is always favored, especially in class actions where the avoidance of formal litigation can save valuable time and resources.").

The criteria guiding the final-approval determination are supplied by Rule 23(e)(2), which requires consideration of whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate"; and "(D) the proposal treats class members equitably relative to each other." In considering these factors, the Court will also look to "the opinion of experienced counsel." *Little v. Wash. Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 37 (D.D.C. 2018); *see also* Fed. R. Civ. P. 23,

Advisory Committee Note, 2018 Amendments (observing that the Rule's enumerated factors are not indented to "displace any factor" rooted in the case law). Because these are the same factors considered at the preliminary-approval stage, "settlement proposals enjoy a presumption of fairness afforded by a court's preliminary fairness determination." *Ciapessoni*, 145 Fed. Cl. at 688.

In its preliminary-approval order, this Court found that the settlement "appears to be fair, reasonable, and adequate" because it "(a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risks, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class" and an "additional Settlement Class"; "(d) does not provide undue preferential treatment to Class Representatives or to segments of the Class"; and "(e) does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1. Nothing has happened in the three-and-a-half months since this Court made those preliminary findings that would justify a contrary conclusion. Quite the opposite: Closer examination only confirms that each factor strongly supports final approval.

A. The class representatives and class counsel have vigorously represented the class throughout this litigation.

The first factor examines the adequacy of representation. In certifying the class in 2017, this Court found that the three named plaintiffs are "particularly good class representatives" and that "[t]here is no dispute about the competency of class counsel"—Gupta Wessler, a litigation boutique with deep (and rare) experience in complex cases seeking monetary relief from the federal government, and Motley Rice, one of the nation's leading class-action firms. ECF No. 33 at 14–16.

That is no less true today. Since this Court's finding of adequate representation, the named plaintiffs and class counsel have spent nearly seven years vigorously representing the class. They did so first in this Court, obtaining informal discovery from the judiciary that paved the way for an unprecedented decision concluding that the AO had violated the law with respect to PACER fees.

They continued to do so on appeal, attracting an impressive set of amicus briefs and favorable press coverage, and ultimately securing a landmark Federal Circuit opinion affirming this Court's decision and rejecting arguments made by the Appellate Staff of the U.S. Department of Justice's Civil Division. And they did so finally in mediation, spending months negotiating the best possible settlement for the class. In short, the representation here is not just adequate, but exemplary.

B. The settlement is the product of informed, arm's-length negotiations.

The next factor examines the negotiation process. It asks whether the negotiations were made at arm's length or whether there is instead some indication that the settlement could have been the product of collusion between the parties.

Here, "both sides negotiated at arms-length and in good faith," and "the interests of the class members were adequately and zealously represented in the negotiations." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9 (D.D.C. 2006) (Friedman, J.). The plaintiffs were represented by class counsel, while lawyers at the Department of Justice and the AO appeared for the government. "Although the mediation occurred before formal fact discovery began," there had been "significant informal discovery," which ensured that "the parties were well-positioned to mediate their claims." *Radosti v. Envision EMI, LLC*, 717 F.Supp.2d 37, 56 (D.D.C. 2010); *see also Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) (explaining that "formal discovery is not . . . required even for final approval of a proposed settlement" if "significant factual investigation [had been] made prior to negotiating a settlement"). "[T]he parties reached a settlement only after a lengthy mediation session that was presided over by an experienced mediator," *Radosti*, 717 F.Supp.2d at 56, and the settlement was approved by DOJ leadership and the judiciary's administrative body. Even in the ordinary case, where a settlement is "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery," without government involvement, there is a

"presumption of fairness, adequacy, and reasonableness." *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019). The presumption here is at least as strong.

C. The settlement relief provided to class members is exceptional—particularly given the costs, risks, and delays of further litigation.

The third and "most important factor" examines "how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman*, 454 F. Supp. 2d at 9–10. This factor focuses in particular on "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2); *see also In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d at 16.

The relief provided to class members is extraordinary. The total value of the settlement is $125 million, and class members will be fully reimbursed, up to $350, for all PACER fees that they paid during the class period. Those who paid more than $350 in fees during the class period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. Further, any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (capped at the total amount of fees that each class member paid during the class period). Because most class members paid less than $350 during the class period, the average class member will receive a full refund of all fees paid. This relief will also be provided in a highly efficient manner—through a common-fund settlement in which class members will not have to submit any claim or make any attestation to receive payment. Agreement ¶ 4.

This would be an excellent outcome for the class even if it were achieved after trial, but it is especially good given the significant costs, risks, and delays posed by pursuing further litigation against the federal court system. The $125 million common fund represents nearly 70% of the total

expenditures determined by the Federal Circuit to have been unlawfully funded with PACER fees during the class period. Without a settlement, the case would be headed for years of litigation and likely another appeal, with no guarantee that the class would wind up with any recovery given the government's remaining argument against liability (that the plaintiffs could not prove that PACER fees would have been lower—or by how much—but for the unlawful expenditures). Although the plaintiffs and class counsel believe that the government's argument is incorrect (and further, that the AO should be liable for some portion of the CM/ECF expenses), the uncertainty and complete lack of case law on this issue counsel in favor of compromise. Add to that the benefits provided by avoiding protracted litigation and time-and-resource-intensive discovery into the remaining issues, and this is a superb recovery for the class.

The settlement's provision for attorneys' fees and service awards is also reasonable, as we discuss in more detail later. The settlement provides that the total amount requested in service awards, litigation expenses, administrative costs, and attorneys' fees will be no more than 20% of the aggregate amount of the common fund; and that "the Court will ultimately determine whether the amounts requested are reasonable." *Id.* ¶¶ 18, 28. The settlement further provides that the plaintiffs will request service awards of no more than $10,000 per class representative. *Id.* ¶ 28.

D. The settlement agreement treats class members equitably relative to each other.

The fourth factor examines whether the settlement treats class members equitably vis-à-vis one other. The settlement here does so. It reimburses every class member for up to $350 in fees paid during the class period and distributes the remaining funds in a way that is proportional to the overcharges paid by each class member. This formula for calculating payments is reasonable under the circumstances. It advances the AO's longstanding policy goal of expanding public access for the average PACER user and, in doing so, approximates how the AO likely would have chosen

to reduce PACER fees during the class period had it been acting under a proper understanding of the law. Indeed, following this Court's summary-judgment decision, the AO doubled the size of the quarterly fee waiver, from $15 to $30. Gupta Decl. ¶ 20. Had it done the same over the class period, the total fee waiver available to all PACER users would have increased by $480. Reimbursing every PACER user for up to $350 in fees paid, with pro rata distributions to any users who paid more than that amount, is therefore fully in keeping with the AO's fee policy and a reasonable allocation of damages. The minimum payments also make it likelier that class members will collect their payments, thereby maximizing recovery to the class.

One class member has nevertheless objected to the settlement's plan of allocation—the only objection received to date. *See* Aug. 8, 2023 Letter from G. Miller. After emphasizing that he has "no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for attorney fees, expenses, [service] awards," and costs, the objector takes issue with the formula for distribution because it "discriminates between larger and smaller claimants." *Id.* at 1. He acknowledges that such an approach is permissible when it can be justified. *Id.* at 1–2. Yet he contends that the line drawn in this case ($350) is substantively unfair and "seems based … on a wish to favor smaller users," which he derides as a "[r]edistribution of wealth." *Id.* at 2.

It is understandable that some class members may wonder why settlement funds are not distributed on a purely pro rata basis. But the objector is mistaken in assuming that there are no "valid reasons" for this. *Id.* To the contrary, there are at least three good reasons: *First*, the text of the E-Government Act—the statute on which the claims here are based—expressly authorizes the judiciary to "distinguish between classes of persons" in setting PACER fees "to avoid unreasonable burdens and to promote public access to such information." 28 U.S.C. § 1913 note. And the AO has long had a policy of doing just that. *Second*, the government's litigating position—and its position during the negotiation process—was that the plaintiffs, in order to prove liability and damages,

would need to show what PACER fees would have been in a but-for world in which the AO complied with the law. The government further maintained that, in keeping with the statutory text and longstanding AO policy, the Judicial Conference of the United States would have used the funds to increase the size of the fee waiver or otherwise expand public access to people burdened by the fees. Although the plaintiffs took a very different position—that liability had been established and damages should be calculated pro rata—the settlement reasonably reflects a blend of these approaches. It is partially pro rata. But, because settlement involves compromise, it is not exclusively pro rata. *Third*, the government insisted on the $350 initial payment as a condition of the settlement. Gupta Decl. ¶ 28. During negotiations, the plaintiffs and class counsel vigorously advocated for a pro-rata approach, and they were able to convince the government to reduce the minimum number to $350, but the government was unwilling to go further. *Id.* Faced with the choice between compromising and walking away, the plaintiffs chose to compromise. There was nothing unreasonable or unfair about doing so. To the contrary, courts routinely recognize that "a Plan of Allocation providing for a minimum payment, to incentivize claims distribution and avoid *de minimis* settlement payments, can be fair and reasonable." *In re Auto. Parts Antitrust Litig.*, 2019 WL 7877812, at *2 (E.D. Mich. Dec. 20, 2019).

In addition, as we explain later, the settlement is equitable in allowing the class representatives to seek service awards of up to $10,000, while recognizing that this Court has discretion to award a smaller amount (or no award at all). *See Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012). Service awards "are not uncommon in common-fund-type class actions and are used to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011). The three nonprofits that prosecuted this case have been actively engaged in the litigation for more than seven years—preparing declarations, receiving case updates, spending countless hours

reviewing drafts and giving substantive feedback, and weighing in throughout the negotiation process, helping to produce a better outcome for all class members. Given their extraordinary contributions, it would be inequitable *not* to compensate them for their service.

E. The plaintiffs and class counsel support the settlement.

The final relevant factor is not enumerated in the text of Rule 23, but it is well-settled in the case law. Under this Court's cases, "the opinion of experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *Prince v. Aramark Corp.*, 257 F. Supp. 3d 20, 26 (D.D.C. 2017). Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F.Supp.2d 105, 121 (D.D.C. 2007); *see also* Burbank Decl. ¶¶ 7–8 (Director of Litigation at the National Veterans Legal Services Program setting forth her strong support for the settlement); Rossman Decl. ¶¶ 4–5 (Litigation Director of the National Consumer Law Center setting forth his strong support for the settlement).

II. The notice and notice programs provided class members with the best notice practicable under the circumstances.

Due process requires that notice to class members be "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950). Rule 23(e)(1) similarly requires that notice be directed in a "reasonable manner to all class members who would be bound by the proposal." The notice here meets these requirements. It described the lawsuit in plain English, including the key terms of the settlement, the procedures for objecting to it, and the date of the fairness hearing. Agreement ¶ 29; *see* ECF No. 153. The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018—also informed them of their right to opt out and the procedures through which they may exercise that right. KCC

Decl. ¶ 8. Further, the notices were distributed in a way that was designed to reach all class members: email notice to all class members for whom the AO has an email address on file; postcard notice to all class members for whom the AO does not have an email address on file, or for whom email delivery was unsuccessful; and publication notice designed to reach individuals and entities whose contact information may not be in the AO's accountholder data. KCC Decl. ¶¶ 5, 8, 10, 12, 13, 15, 16. Relevant case documents are also available on the settlement website. KCC Decl. ¶ 18.

III. The requested attorneys' fee award is reasonable.

A. This Court should use the percentage-of-the-fund approach to assess the reasonableness of class counsel's fee request.

In class actions, "class counsel may request an award of fees from the common fund on the equitable notion that lawyers are entitled to reasonable compensation for their professional services from those who accept the fruits of their labors." *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005); *see* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."); *Applegate v. United States*, 52 Fed. Cl. 751, 755 (2002) ("For more than a century, … courts have awarded fees to an attorney who succeeds in creating, protecting or enhancing a common fund from which members of a class are compensated for a common injury."); *see also Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1371 (Fed. Cir. 2023). The district court has a "duty to ensure that [any such request] for attorneys' fees [is] reasonable." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993).

Courts have identified two approaches for assessing the reasonableness of class counsel's fee request. The first is the "percentage-of-the-fund method, through which a reasonable fee is based on a percentage of the fund bestowed on the class." *Health Republic*, 58 F.4th at 1371 (cleaned up). The second is the "lodestar" method, "through which the court calculates the product of

reasonable hours times a reasonable rate and then adjusts that lodestar result, if warranted, on the basis of such factors as the risk involved and the length of the proceedings." *Id.* (cleaned up).

As between these two approaches, courts overwhelmingly prefer the percentage-of-the-fund approach in common-fund cases. *See* Fitzpatrick Decl. ¶ 10 (noting that this approach is used in about 90% of common-fund cases); *Manual for Complex Litig.* § 14.121 (4th ed. 2004) ("[T]he vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."); *see also, e.g.*, *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023) ("We have … express[ed] a preference for the percentage-of-the-fund approach."). The lodestar method, in contrast, is "used generally outside the common-fund context," *Health Republic*, 58 F.4th at 1371, such as when a defendant is obligated to pay fees under a fee-shifting statute.

Courts use the percentage-of-the-fund approach for good reason. It replicates the market, is easy to apply, and "helps to align more closely the interests of the attorneys with the interests of the parties by discouraging inflation of attorney hours and promoting efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 88 (D.C.C. 2013) (Friedman, J.) (cleaned up); *see Little*, 313 F. Supp. 3d at 38 (making same points); Fitzpatrick Decl. ¶¶ 9–12 (expanding on these points); Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1159–63 (2021); *see also, e.g.*, *Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1055 (S.D. Cal. 2017) ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure."); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in

this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," whereas "the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." (cleaned up)); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) ("[U]se of the POF method in common fund cases is the prevailing praxis" due to its "distinct advantages.").

The preference for the percentage-of-the-fund approach is so strong that some circuits, like the D.C. Circuit, have essentially mandated its use in common-fund cases. *See Swedish Hosp.*, 1 F.3d at 1271 ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1278 (11th Cir. 2021) ("[I]n common fund settlements like this one, an attorney's fee award shall be based upon a reasonable percentage of the fund established for the benefit of the class.") (cleaned up); *Rite Aid*, 396 F.3d at 306 ("[T]he percentage of common fund approach is the proper method of awarding attorneys' fees."). Although the Federal Circuit has not gone this far, *see Health Republic*, 58 F.4th at 1371, fee awards in the circuit are "typically based on some percentage of the common fund." *Moore*, 63 Fed. Cl. at 786; *see, e.g.*, *Mercier v. United States*, 156 Fed. Cl. 580, 591 (2021) (awarding fees as a percentage); *Kane Cnty. v. United States*, 145 Fed. Cl. 15, 18–20 (2019) (same); *Quimby v. United States*, 107 Fed. Cl. 126, 133–35 (2012) (same). This case calls for the same approach.

B. A fee of 19.1% of the common fund is reasonable.

The next question is whether the requested fee constitutes a reasonable percentage of the common fund. To help answer this question, courts within the Federal Circuit have devised a multifactor test, under which seven factors are relevant: "(1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been

negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award." *Health Republic*, 58 F.4th at 1372 (quoting *Moore*, 63 Fed. Cl. at 787).

Here, each factor supports the requested fee. A thorough application of the multifactor test thus only confirms this Court's preliminary finding that the settlement—which authorizes class counsel to seek fees of up to 20% of the common fund (minus the amounts for expenses and service awards)—"does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1.

1. The quality of counsel supports the requested fee.

On the first factor, there can be "little question about the skill and efficiency demonstrated by class counsel in this case." *Black Farmers*, 953 F. Supp. 2d at 92. Class counsel are a small team of lawyers from two preeminent law firms: Gupta Wessler, a litigation boutique with significant experience in complex cases seeking monetary relief against the federal government, and Motley Rice, a leading class-action firm. *See* Gupta Decl. ¶¶ 12, 45–48; Oliver Decl. ¶ 2. This Court has already recognized that these lawyers are "experienced," ECF No. 153 at 1, and that "[t]here is no dispute about the[ir] competency," ECF No. 33 at 15–16. Other courts have agreed. *See, e.g.*, *Steele v. United States*, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015) (finding the same lawyers to be "accomplished attorneys" who have "demonstrated significant experience in handling class actions, including class actions … against the government," and appointing them as class counsel in an illegal-exaction case against the United States, while emphasizing that "the Court is thoroughly impressed by the[ir] qualifications"); *Mercier*, 156 Fed. Cl. at 591 (finding that Motley Rice "has extensive experience litigating class actions" and has "vigorously prosecuted" class actions against the federal government, achieving "excellent result[s]"); *Houser v. United States*, 114 Fed. Cl. 576 (2014) (certifying class of all federal bankruptcy judges represented by the same two Gupta Wessler lawyers, who later obtained a $56 million judgment).

Further, class counsel faced a formidable group of lawyers from the Department of Justice, who tenaciously defended this case on every possible ground, from jurisdiction to class certification to the merits. The government did so not only in this Court, but also in the Federal Circuit, where it presented arguments from the Civil Division's Appellate Staff. Defeating all of these arguments—and then successfully negotiating a historic settlement—"called for a host of skills by class counsel." *Black Farmers*, 953 F. Supp. 2d at 92; *see* Burbank Decl. ¶¶ 5, 7–8 (testifying to the quality and skill of class counsel's work); Rossman Decl. ¶¶ 2, 4 (same); Brooks Decl. ¶ 3 (same); Fitzpatrick Decl. ¶¶ 8, 20–21 (same); *see also In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 112 (D.D.C. 2013) ("[T]he best testament to their effectiveness was their ability to successfully resolve this exceedingly complex case and secure the … settlement … while battling opposing counsel at the very top of the defense bar."). The first factor thus strongly supports the requested fee.

2. The complexity and duration of the case supports the requested fee.

So does the second factor. Class counsel have been litigating this case for over seven years. They defeated a motion to dismiss, obtained certification of a nationwide class of hundreds of thousands of people, engaged in informal discovery, secured an unprecedented ruling from this Court on liability, successfully defended that ruling on appeal (both as to jurisdiction and liability), negotiated a historic settlement on remand, obtained preliminary approval of the settlement, and assisted class members with an unusually large and complex set of questions about the settlement-administration process—a process that is ongoing and that will only intensify once the settlement is administered. Moreover, the legal and practical questions that they have confronted have been extraordinarily complex and challenging. *See* Gupta Decl. ¶¶ 6–9 (detailing complexity of legal issues); Fitzpatrick Decl. ¶ 20 (same); Burbank Decl. ¶¶ 3, 8 (same, with a focus on illegal-exaction issues); Oliver Decl. ¶¶ 5–7 (detailing complexity of settlement-administration issues); KCC Decl.

¶¶ 15–17 (same). By any measure, then, the second factor supports the requested fee. *See Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 105 ("[T]he settlement certainly 'does not come too early to be suspicious.' Nor does it come 'too late to be a waste of resources.'").

3. The risk of nonrecovery supports the award.

Now for the third factor: litigation risk. When lawyers take a case on contingency, their percentage fee must compensate them "for the risk of nonpayment." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Id.*

To say that this case was "unusually risky" is an understatement. *Id.* It involved a challenge to a fee schedule promulgated by the Judicial Conference of the United States, presided over by the Chief Justice. The challenge concerned a statute that had "never [been] interpreted by a court," *Black Farmers*, 953 F. Supp. 2d at 93, and that "nowhere explicitly requires payment of damages by the government for overcharging users," *NVLSP*, 968 F.3d at 1348; *see* ECF No. 105 at 5–7 (authorizing appeal because "there is a complete absence of any precedent from any jurisdiction," the government's argument "is not without merit," and "there would be no liability and the case would be over" if the argument were correct). The contours of the "relatively obscure cause of action" on which the plaintiffs relied had "remained unresolved in the courts" when the case was filed. Burbank Decl. ¶ 8. And, because the judiciary is not subject to the Administrative Procedure Act and bringing individual claims would not have been economically rational, the plaintiffs had to pursue a class action for money damages against the judiciary, which had no historical precedent. *See* Fitzpatrick Decl. ¶ 20 ("In all my years of studying class actions and litigation against the federal government, I am not aware of any previous class action that has successfully been brought against the federal judiciary."). All the while, class counsel went about their work, devoting thousands of hours to the case without receiving any compensation, or any guarantee of future

compensation. If this case doesn't carry with it a considerable risk of nonrecovery, it is hard to imagine a case that would.

As Professor Fitzpatrick puts it: "[E]very step of this lawsuit required a new trail to be cut. Not only procedurally—Did the Court have jurisdiction? Was there a cause of action? Did the judiciary have sovereign immunity?—but also on the merits—How should the E-Government Act be interpreted? How can any violation of it be proved? None of these questions were even 50-50 propositions for the class when this litigation began. People had been complaining about high PACER fees for years, but no one had invented a legal solution to the problem until class counsel did." Fitzpatrick Decl. ¶ 20. As this Court explained in a different class action against the federal government that also carried considerable risk: "The prospect of such litigation is daunting, and many attorneys would not have undertaken it." *Black Farmers*, 953 F. Supp. 2d at 93.

Of course, now that the "legal solution" that had escaped so many for so long is clear, Fitzpatrick Decl. ¶ 20, it might be easy to forget how risky this case was at the start. But that is only because "hindsight alters the perception of the suit's riskiness." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). Properly understood, this factor emphatically supports the requested fee.

4. The fee that likely would have been negotiated between private parties in similar cases supports the requested fee.

The next factor only further confirms the fee's reasonableness. A contingency fee of 19.1% is a much smaller percentage than what the private market would bear. *See* Fitzpatrick Decl. ¶ 14 ("The request here is about 19% of the settlement. It is well known that this is well below what private parties negotiate when they hire lawyers on contingency."). For contingency cases, it is "typical" to have a fee arrangement "between 33 and 40 percent." *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998). That is exactly what the three named plaintiffs agreed to here. Before the case was filed, each signed a retainer agreement with class counsel that provided for a contingency fee

of up to 33% of the common fund. Gupta Decl. ¶ 65; *see Kane Cnty.*, 145 Fed. Cl. at 19 ("A fee of one third the total recovery is consistent with the fee that likely would have been negotiated by private parties. In fact, that was the fee negotiated between class counsel and the lead plaintiff.").

More importantly, when the class was certified in 2017, the notice informed class members: "By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court." *See* ECF Nos. 43-1 & 44. The notice also informed them of their right to opt out of the class. "A contingent fee that is reached by the free consent of private parties should be respected as fair as between them." *Quimby*, 107 Fed. Cl. at 134. That is all the more true here, where class members agreed to "a fee request *even greater* than" the 19.1% fee now sought by class counsel, and where many class members are "sophisticated parties like lawyers and large institutions." Fitzpatrick Decl. ¶ 26; *see Quimby*, 107 Fed. Cl. at 134 (relying on similar language and reasoning that, by choosing to participate in the class, "each member effectively accepted the offer of representation for a thirty percent contingency fee, and presumably concluded that a better deal could not be reached with their own counsel").

5. The reaction of class members to date supports the requested fee.

"The free consent of class members to a thirty percent fee perhaps explains the absence of objections" to date—the fifth factor. *See Quimby*, 107 Fed. Cl. at 134. Indeed, as of the filing of this motion, none of the hundreds of thousands of class members has signaled any objection to the settlement's fee provision (or for that matter, to the amount of the common fund). *See id.* (approving fee where "only one class member has objected to the [settlement's] terms related to attorneys' fees"); *Sabo v. United States*, 102 Fed. Cl. 619, 628–29 (2011) (explaining that a relative lack of objections "weigh[s] in favor of approv[al]"). And the class representatives fully support the fee request. *See*

Burbank Decl. ¶ 7; Rossman Decl. ¶ 5; Brooks Decl. ¶ 3. The lack of objections to the fee provision is particularly relevant here because, as just noted, class members are disproportionately likely to read and pay attention to legal filings, and to be aware of their legal rights. Thus, while it is possible that objections will be forthcoming, as of now, this factor provides additional support for the fee.

6. The percentage awarded in other cases supports the requested fee.

The sixth factor—comparing the percentage fee to other class actions—further supports the fee request. Generally speaking, a contingency fee of "one-third is a typical recovery." *Moore*, 63 Fed. Cl. at 787; *see, e.g., Kane Cnty.*, 145 Fed. Cl. at 19 ("[A]n award equal to one third of the common fund is commensurate with attorney fees awarded in other class action common fund cases."); *Quimby*, 107 Fed. Cl. at 133 ("A fee equal to thirty percent of the common fund totaling nearly $74 million is … within the typical range of acceptable attorneys' fees."); *Moore*, 63 Fed. Cl. at 787 (awarding 34% as "well within the acceptable range"); *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 111 ("Both nationally and in this Circuit, 'a majority of common fund class action fee awards fall between twenty and thirty percent.'"); *see also* Fitzpatrick Decl. ¶ 15 (providing statistical averages).

A fee award of 19.1% is well within the norm for settlements of this size. It is "actually below the average percentage … for settlements between $69.6 and $175.5 million" (19.4%). Fitzpatrick Decl. ¶ 19; *see Equifax*, 999 F.3d at 1281 ("20.36 percent is well within the percentages permitted in other common fund cases, and even in other megafund cases"); *see also, e.g.*, *Mercier*, 156 Fed. Cl. at 592 (20% of $160 million fund); *Fed. Nat'l Mortg.*, 4 F. Supp. 3d at 112 (19% of $153 million fund); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *12 (D.D.C. July 16, 2001) (33% of $365 million fund). And the reasonableness of the percentage becomes even clearer when the amounts of older funds are adjusted for inflation. *See, e.g.*, *Quimby*, 107 Fed. Cl. at 133 (30% award of fund equal to $100 million in today's dollars according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator,

https://perma.cc/TEE4-BAJX). Professor Fitzpatrick's study, for example, analyzed data from 2006 to 2007 and found that, for settlements of between $72.5 million and $100 million—or about $110 million to $150 million today—the average award was 23.9%. *See* Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811, 839 (2010). An award of 19.1% of the common fund thus "clearly would be reasonable" in a typical case involving a $125-million fund today. *Black Farmers*, 953 F. Supp. 2d at 99. And, as already discussed, the "considerations … that reveal this case to be dissimilar" to the typical case would justify a *higher* percentage—not a lower one. *Id.*[2]

7. The size of the award supports the requested fee.

That leaves the last factor. Although the requested fee award is sizable ($23,863,345.02), it pales in comparison to the relief obtained for the class. And because "[t]he result is what matters" most in the end, when "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *see also Quimby*, 107 Fed. Cl. at 133.

As explained earlier, the relief that the settlement provides to class members is remarkable. The total value of the settlement is $125 million, and every class member will be reimbursed, up to

[2] A decade ago, this Court described a "megafund" as a recovery of "$100 million or more." *Black Farmers*, 953 F. Supp. 2d at 98. That amount would equal more than $140 million in today's dollars, so this case wouldn't qualify as a megafund even under that definition. Moreover, as Professor Fitzpatrick explains, lowering the percentage simply because the common fund is over $100 million could "actually make class counsel *better off* by resolving a case for less rather than more if it is not done only on the margin (e.g., only for the *portion* above $100 million)." Fitzpatrick Decl. ¶ 17. This case provides an example. If the common fund were $99 million instead of $125 million, the same requested fee would be about 24% of the fund—well within the typical range. It would be irrational to punish class counsel for doing better by the class. *See Synthroid*, 264 F.3d at 718 ("This means that [class] counsel … could have received [more] fees" had they not "obtained an extra $14 million for their clients … Why there should be such a notch is a mystery. Markets would not tolerate that effect."). In any event, as this Court observed (and as the data shows), "even in megafund cases involving recoveries of $100 million or more, fees of fifteen percent are common." *Black Farmers*, 953 F. Supp. 2d at 98 (cleaned up).

$350, for PACER fees that they paid between April 21, 2010 and May 31, 2018. Those who paid more than $350 in fees during that period will receive $350 plus their pro rata share of the remaining settlement funds. And the relief will be provided in a highly efficient manner. This would be a terrific outcome for the class even if it were achieved after trial, but it is especially good given the substantial costs, risks, and delays presented by pursuing further litigation against the federal judiciary—including the very real risk that the plaintiffs would ultimately not prevail at all. As compared to this result for the class, the requested fee is fair and reasonable.

C. A lodestar cross-check, although not required, would only confirm the reasonableness of the requested fee.

Courts sometimes use a "lodestar cross-check" to further inform the reasonableness of a percentage fee. *See Health Republic*, 58 F.4th at 1372, 1374 n.2; Fitzpatrick Decl. ¶ 22 (noting that a "significant minority of courts" do so). Such a cross-check is not required by D.C. Circuit or Federal Circuit precedent. The danger with the lodestar cross-check is that it "brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place." Fitzpatrick Decl. ¶ 23. To illustrate, Professor Fitzpatrick hypothesizes a case in which "a lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be *rationally indifferent* between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members." Fitzpatrick Decl. ¶ 24. 25.

When courts nevertheless elect to conduct a cross-check, they do so "by dividing the proposed fee award by a lodestar calculation, resulting in a lodestar multiplier." *Health Republic*, 58 F.4th at 1372 (cleaned up). Because the multiplier "attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work," *Rite Aid*, 396 F.3d at 306, courts that elect to perform a lodestar cross-check should "take care to explain how the application of a multiplier is justified by the facts of a particular case," while also considering the "multipliers used in comparable cases," *Health Republic*, 58 F.4th at 1375.

At the same time, courts must keep in mind that "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *Rite Aid*, 396 F.3d at 307. This general principle has two relevant corollaries: The first is that the "multiplier need not fall within any pre-defined range." *Health Republic*, 58 F.4th at 1375; *see Rite Aid*, 396 F.3d at 307 ("[T]he resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award."); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (rejecting the argument "that any percentage fee award exceeding a certain lodestar multiplier is excessive"). Were it otherwise, and the multiplier could serve to cap fees, it would "eliminate counsel's incentive to press for a higher settlement" in many cases, *Williams*, 658 F.3d at 636 (cleaned up)—and thus "reintroduce[] the very same misaligned incentives that the percentage method was designed to correct in the first place," Fitzpatrick Decl. ¶ 23. The second corollary is that "mathematical precision" is not required in a cross-check. *Rite Aid*, 396 F.3d at 306. "Requiring the Court to examine and evaluate [] detailed" time records "would defeat one of the primary benefits of the 'percentage of the fund' method"—conserving 'judicial resources" and preventing "delay in distribution of the common fund to the class." *Black Farmers*, 953 F. Supp. 2d at 101 n.8. Heeding these two corollary principles helps to ensure that the lodestar cross-check is used truly as a cross-check—and not just a way of "bring[ing] through the backdoor all of the bad things the lodestar

method used to bring through the front door." *See* Fitzpatrick Decl. ¶¶ 23–25 ; *see also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 729 (2d Cir. 2023) (Jacobs, J., concurring) (noting that the cross-check, if it operates as a hard cap on fees, can provide "an incentive for counsel to prolong litigation and maximize billable hours to arrive at a lodestar that does not operate as a cap on a percentage award").

In this case, class counsel's lodestar is $6,031,678.25, yielding a lodestar multiplier of less than 3.96. *See* Gupta Decl. ¶ 64; Oliver Decl. ¶ 13. That is in line with a standard multiplier. *See* Fitzpatrick Dec. ¶ 27. As the Federal Circuit recently remarked, a multiplier of up to four is the "norm." *Health Republic*, 58 F.4th at 1375; *see also Black Farmers*, 953 F. Supp. 2d at 102 ("Multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied." (cleaned up)); *Kane Cnty.*, 145 Fed. Cl. at 20 ("[A] multiplier of approximately 6.13 … is within the range courts have approved in common fund cases."); *Geneva Rock Prods.*, 119 Fed. Cl. at 595 ("[A]n award 5.39 times the lodestar is reasonable … given the complexity of the litigation, the diligent and skillful work by class counsel, and the pendency of the case for over six years."); *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) ("Although the lodestar multiplier need not fall within any pre-defined range, we have approved a multiplier of 2.99 in a relatively simple case." (cleaned up)). And a higher multiplier may be justified by the circumstances of a "particular case," including "the risk of nonpayment," the lack of significant "object[ion] to the award," and whether the notice indicated an "agreement by the class to a specified percentage." *Health Republic*, 58 F.4th at 1375–77.[3]

[3] This total figure includes $3,271,090.25 and $1,860,588.00 in lodestar incurred to date by Gupta Wessler and Motley Rice, respectively, as well as projected future work that will produce an additional lodestar of about $900,000. Gupta Decl. ¶ 62 ($400,000 for Gupta Wessler); Oliver Decl. ¶ 9 ($500,000 for Motley Rice). The past lodestar figures, standing alone, are "incomplete," *Black Farmers*, 953 F. Supp. 2d at 102, because they do not include work that class counsel will perform

All these features are present in this case. As one judge on this Court has explained: "The flaw with comparisons to fees in other cases, of course, is that they inevitably tend to focus on averages and medians and ranges. This case, however, was anything but average." *Fed. Nat'l Mortgage Ass'n*, 4 F. Supp. 3d at 112. The same point applies here. *Id.* Far from being a "relatively simple case," *Milliron*, 423 F. App'x at 135, "there is no question that this litigation was lengthy, highly complex, and vigorously contested," *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 112. The "complexity and duration of the case," "high risk of nonpayment," and "skill and performance of the attorneys" distinguish this case from the ordinary case, justifying an above-average multiplier. *Id.* And the lack of significant "object[ion] to the award," and the notice language signaling an "agreement by the class to a specified percentage" that greatly *exceeds* the fee requested here, only

---

going forward—including responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal; assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise. *See Geneva Rock Prods., Inc. v. United States*, 119 Fed. Cl. 581, 595 (2015), *rev'd on other grounds sub nom. Longnecker Prop. v. United States*, 2016 WL 9445914 (Fed. Cir. Nov. 14, 2016) ("When cross-checking an award," the lodestar "must be augmented … to reflect the additional time that has been and will be spent by class counsel on the request for the court's approval of the settlement, the fairness hearing and supplemental submissions, and further settlement obligations"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 746 Fed. App'x 655, 659 (9th Cir. 2018) (finding it appropriate for cross-check to "compar[e] the fee award to a lodestar that included projected work," such as work "defend[ing] against appeals and assist[ing] in implementing the settlement"). The projected figures here are based in part on an extrapolation of the settlement-related work performed in recent months and are appropriately included as part of the lodestar. *See, e.g., Martin v. Toyota Motor Credit Corp.*, 2022 WL 17038908, at *14 (C.D. Cal. Nov. 15, 2022) ("Class Counsel additionally estimate they will incur at least an additional $600,000 in fees … . Although this is merely a projection, the Court finds that projected fees are appropriate considerations in lodestar cross-checks." (cleaned up)); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *40 (N.D. Ga. Mar. 17, 2020), *aff'd in relevant part*, 999 F.3d 1247, 1278 (11th Cir. 2021) (explaining that a "reasonable estimate" of future time—there, 10,000 hours—may properly be included in conducting a lodestar cross-check, because, "[i]f the fee was lodestar-based, class counsel would be entitled to file supplemental applications for future time"; "[e]xcluding such time thus would misapply the lodestar methodology and needlessly penalize class counsel").

drive the point home. *Health Republic*, 58 F.4th at 1375–77; *see* Fitzpatrick Decl. ¶ 26 ("[A]t the outset of the litigation, would class members have objected to paying class counsel 19% of whatever was recovered here? We do not have to guess at the answer: despite the opportunity to opt out when they received the class certification notice advising them of a fee request *even greater* than this one, the original class—which … are largely sophisticated parties like lawyers and large institutions—decided not to opt out. … [N]ew class members are currently being given the same chance.").

In fact, "the risk of nonpayment" alone justifies the multiplier. *Health Republic*, 58 F.4th at 1375. A simple math exercise shows why. To "properly incentivize … contingency representation," a multiplier would have to at least be "the inverse of the riskiness of the case." Fitzpatrick Decl. ¶ 28. Here, there were at least three novel, fiercely contested, and independently case-dispositive issues: Is there jurisdiction (including a cause of action and waiver of sovereign immunity) for this claim? Can a class action for monetary relief be certified against the federal judiciary? And did the judiciary violate the statute, and do so in a way that created liability? If the government prevailed on even just one of these issues, there would no classwide liability and therefore no attorneys' fees. So if the government had even a 40% chance of prevailing on any of these independent issues, that would meant that the plaintiffs had little more than a 20% chance of obtaining any classwide relief when the case was filed—fully justifying a multiplier of five. And, if Professor Fitzpatrick were right that "[n]one of these questions were even 50-50 propositions for the class when this litigation began," the multiplier would have to be over eight to account for the risk. *Id.* ¶ 20. Hence his conclusion that, "in light of the extreme risks involved here," the multiplier is "below what would have been needed to properly incentivize this contingency representation." *Id.* ¶ 28.

"Applying a lodestar cross-check, therefore, confirms that the award sought by class counsel is neither unusual nor unreasonable." *Black Farmers*, 953 F. Supp. 2d at 102. To the contrary, the cross-check "yields an award consistent with the one derived from the application of the percentage

[method]," confirming the reasonableness of the requested fee. *Kane Cnty.*, 145 Fed. Cl. at 20. The litigation and settlement-administration expenses incurred by class counsel were reasonable and should be reimbursed from the common fund.

"In addition to being entitled to reasonable attorneys' fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund." *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 113; *see Mercier*, 156 Fed. Cl. at 593 ("It is well settled that counsel who have created a common fund for the benefit of a class are entitled to be awarded for out-of-pocket costs reasonably incurred in creating the fund."); Fed. R. Civ. P. 23(h); *see also, e.g.*, *Kane Cnty.*, 145 Fed. Cl. at 20–21.

Here, class counsel incurred $29,654.98 in expenses. Many of these expenses were for hiring the mediator and for travel costs, and each expense was actually and reasonably incurred. *See* Oliver Decl. ¶¶ 14–19. Accordingly, class counsel should be reimbursed for these reasonable, out-of-pocket expenses. *See Quimby*, 107 Fed. Cl. at 135.

In addition, the settlement authorizes KCC to retain from the common fund all notice and administration costs actually and reasonably incurred. KCC originally provided class counsel with a total not-to-exceed amount of $977,000, which we have revised to include an additional $100,000 to account for previously unanticipated complexities. *See* Oliver Decl. ¶ 19. We ask that this amount be set aside to cover current and "future administrative fees and costs." *Quimby*, 107 Fed. Cl. at 135.

IV. The Court should award each of the three class representatives $10,000 for their contributions to the case.

Finally, class counsel seeks service awards (also known as case-contribution awards) for each class representative. "Case contribution awards recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions." *Mercier*, 156 Fed. Cl. at 589 (awarding $20,000 per representative). This Court has already recognized that "the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives" because they

"have dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent." ECF No. 33 at 14. It should now recognize that their service justifies a modest award.

The three named plaintiffs here took on considerable risk and responsibility when they agreed to serve as class representatives. They all "consulted regularly with counsel throughout the litigation and were actively involved in all material aspects of the lawsuit." *Mercier*, 156 Fed. Cl. at 589; *see* Rossman Decl. ¶¶ 2–3; Burbank Decl. ¶¶ 4–6; Brooks Decl. ¶ 2. In fact, the individuals at each organization who participated in the case are themselves lawyers, and they estimate that, for each organization, the full requested award may be justified based solely on the amount of attorney time spent working on the case. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2.

Yet there is another reason to grant the requested awards here. Just as "it takes courage to be the public face of litigation against one's employer," *Mercier*, 156 Fed. Cl. at 589, it also takes courage for legal-advocacy organizations to be the public face of litigation against the federal-court system. *See* Rossman Decl. ¶ 2; Burbank Decl. ¶ 5. Thus, whether the Court wants to focus on "the contributions of the named representatives" or "the risks they bore," both were "unique." *Mercier*, 156 Fed. Cl. at 590. And together, they undoubtedly justify an award of $10,000 per representative.

CONCLUSION

This Court should grant the motion and enter the proposed order. In addition to approving the settlement, the Court should award 20% of the settlement fund to cover attorneys' fees, notice and settlement costs, litigation expenses, and service awards. Specifically, the Court should (1) award $10,000 to each class representative, (2) award $29,654.98 to class counsel to reimburse litigation expenses, (3) order that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) award the remainder (19.1% of the settlement fund, or $23,863,345.02) to class counsel as attorneys' fees.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER LLP
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

MEGHAN S.B. OLIVER
CHARLOTTE E. LOPER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

August 28, 2023

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al. *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

DECLARATION OF RENÉE BURBANK

I, Renée Burbank, declare as follows:

1. I am the Director of Litigation at the National Veterans Legal Services Program (NVLSP), a national nonprofit organization that seeks to ensure that American veterans and active-duty personnel receive the full benefits to which they are entitled for disabilities resulting from their military service. Over the years, the organization has represented thousands of veterans in court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules, practices, and policies of the U.S. Department of Veterans Affairs and U.S. Department of Defense. NVLSP believes firmly in the importance of ensuring that veterans who are navigating the federal court system—like unrepresented or under-represented litigants in general—should have free and open access to judicial records.

2. Before joining NVLSP in July 2021, I was a Clinical Lecturer and Robert M. Cover Clinical Teaching Fellow at Yale Law School, teaching and supervising students in both the Veterans Legal Services Clinic and the Peter Gruber Rule of Law Clinic. In that capacity, I supervised advocacy on behalf of veterans and oversaw class-action litigation. While at Yale, I wrote a comprehensive article on illegal-exaction claims against the federal

government, *Illegal Exactions*, 87 TENN. L. REV. 315 (2020). The article has been cited multiple times in published decisions by the U.S. Court of Federal Claims. Before teaching at Yale, I was a litigator in the U.S. Department of Justice, where I worked on complex commercial litigation at both the trial and appellate levels. In that capacity, I served as lead or co-counsel on a variety of class actions brought against the federal government, including the landmark illegal-exaction case *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428 (2015), *affirmed in part and vacated in part*, 856 F.3d 953 (Fed. Cir. 2017). I am a graduate of Harvard Law School (J.D., *cum laude*, 2009) and the University of Chicago (B.A., Honors in the College, 2004) and clerked for the Honorable David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit.

3. In my capacity as Director of Litigation of NVLSP, I have advised many veterans on their legal rights, including in disputes with the federal government over fees and other payments, and I am quite familiar with the difficulties in obtaining monetary relief against the United States in court. In all, I have served as counsel in over two dozen class-action cases in my career—all of them involving claims against the federal government—and am familiar with the resources, time, and money required to successfully pursue class-action claims. I offer this declaration in support of the plaintiffs' motion for final approval of the class-action settlement in this case, including the plaintiffs' request for attorneys' fees and a service award for NVLSP.

4. NVLSP has actively served as a named plaintiff in this class action for more than seven years, since it was filed. When I joined NVLSP, the parties had already begun settlement discussions and made significant headway toward an eventual resolution, but they had not yet reached an agreement. Although I was already familiar with the public filings in the case because of my academic research on illegal-exaction law, I had to spend time getting

up to speed on additional developments so I could advise NVLSP on the negotiations and improve any eventual settlement for the benefit of the organization, its clients, and all PACER users. In addition to reviewing case filings and other relevant materials, I had several calls with class counsel, where I made suggestions that improved the terms of the settlement.

5. Before I joined NVLSP, Barton Stichman, our former Executive Director, reviewed and commented on draft pleadings, consulted on litigation strategy, provided a declaration in support of class certification, participated in discovery, received updates on motion practice and court rulings from class counsel, and actively engaged in the class-action settlement process. Mr. Stichman also engaged in substantial due diligence before deciding that NVSLP would join this litigation as a named plaintiff. As an organization that often represents others in litigation before the federal courts, the decision to sue the federal court system was not a decision NVLSP made lightly. The organization was well aware, at the time it decided to sue, that it would be challenging a fee structure set by the Judicial Conference of the United States, the judiciary's policymaking body. NVLSP would not have authorized its participation in this lawsuit had it not been convinced that class counsel were particularly skilled and that the aims of the litigation were in the public interest.

6. Since the settlement in this case was announced, NVLSP has received numerous inquiries from potential class members, possibly because NVLSP is listed first on the case caption, which has required additional attorney and administrative staff time. All told, I estimate that my attorney colleagues and I have spent more than 25 hours working on this litigation on NVLSP's behalf during the seven years that the case has been pending, with several more hours spent by non-attorney administrative staff. I understand that counsel will seek a service award for NVLSP of $10,000. At our market billing rates, the value of attorney time incurred by NVLSP greatly exceeds that amount.

7. Based on my active participation in this litigation and my expertise in illegal-exaction cases and class actions against the government, I am convinced that the proposed settlement in this case is fair, adequate, and reasonable. And, in light of the considerable risk, expense, and seven-year duration of this litigation, and the impressive results achieved, I find class counsel's request for attorneys' fees comprising about 19% of the common-fund to be reasonable under the circumstances. NVLSP fully supports the motion for final approval and the motion for fees, costs, and awards.

8. This was a uniquely risky and difficult case—a nationwide class action against the federal judiciary, seeking millions of dollars on the basis of an entirely novel legal theory, invoking a statute whose meaning had never been litigated, and based upon a relatively obscure cause of action. When this case was filed, many aspects of illegal-exaction claims remained unresolved in the courts, including basic concepts about the required elements of a claim, how damages are calculated, and even the legal basis for such claims. *See generally Illegal Exactions*, 87 TENN. L. REV. at 340–45 (describing areas of illegal-exaction case law still unresolved as of 2020). Class counsel, however, displayed exceptional tenacity and litigation skill in navigating these murky waters. Against all odds, the litigation succeeded at every turn. It sparked public interest in the need to reform PACER fees, spurred legislative action, and delivered a landmark settlement to which NVLSP is proud to have contributed. We are hopeful that this litigation will serve as a blueprint for holding the judiciary accountable and, over the long term, will contribute to transparency and openness in the federal courts.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on August 18, 2023.

/s/ Renee Burbank
_____
Renée Burbank

Case 1:16-cv-00745-PLF Document 158-1 Filed 08/28/23 Page 5 of 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al. *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

DECLARATION OF STUART T. ROSSMAN

I, Stuart T. Rossman, declare as follows:

1. I am the Litigation Director of the National Consumer Law Center (NCLC), a national nonprofit organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation. I am also the co-editor of NCLC's treatise, *Consumer Class Actions*, and for many years coordinated NCLC's annual symposium on class actions. In addition, I am a past Co-Chair of the Board of the National Association of Consumer Advocates, which publishes the *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 299 F.R.D. 160, first published in 1998 and updated most recently in 2023. I am a graduate of Harvard Law School (J.D., *cum laude*, 1978) and the University of Michigan (B.A. *magna cum laude*, 1975) and a visiting lecturer at the University of Michigan Law School, where I have regularly taught a seminar on class actions. In my capacity as Litigation Director of the NCLC, I have co-counseled with and advised many attorneys on class-action cases around the country and am well acquainted with the resources, time and money required to successfully pursue class-action claims. I offer this declaration in support of the plaintiffs'

motion for final approval of the class-action settlement in this case, including the plaintiffs' request for a service award for NCLC.

2. NCLC has actively served as a named plaintiff in this class action for more than seven years, since the inception of the case. As an organization that often participates in litigation before the federal courts, we did not make the decision to sue the federal judiciary lightly. We were well aware, at the time we decided to sue, that we would be challenging a fee structure set by the Judicial Conference of the United States, presided over by the Chief Justice. We would not have decided to authorize suit had we not been convinced that class counsel were exceptionally skilled and that the aims of the litigation were worthwhile and in the public interest. Before recommending that NCLC join this litigation, I led NCLC's extensive due diligence to determine the risks, obstacles, and merits of the case, in collaboration with NCLC's Litigation Steering Committee. This included an independent review of legal memoranda, detailed questions for class counsel, and careful consideration of the implications for pro se individuals and the intricacies of the PACER, ECF, and Next Gen systems, among other things.

3. Throughout this litigation, I reviewed and commented on draft pleadings, consulted on litigation strategy, provided a declaration in support of class certification, participated in discovery, received updates on motion practice and court rulings from class counsel, and actively engaged in the class-action settlement process. Over the past seven years, I have spent more than 25 hours working on this litigation on NCLC's behalf. I understand that counsel will seek a service award for NCLC of $10,000. At my current billing rates, the amount of attorney time incurred by NCLC greatly exceeds that amount.

4. This was a uniquely risky and difficult case—a nationwide class action against the federal judiciary, seeking millions of dollars on the basis of an entirely novel

legal theory, invoking a statute whose meaning had never been litigated. But class counsel were equal to the task and the tenacity and litigation skill they displayed was uniquely strong. Against all odds, the litigation succeeded at every turn. It sparked public interest in the need to reform PACER fees, spurred legislative action, and delivered a landmark settlement of which we are proud to have contributed.

5. In my view, based on my active participation in this litigation and my decades of experience with class-action settlements, the proposed settlement in this case is fair, adequate, and reasonable. I understand that class counsel is seeking a fee equal to about 19% of the common fund. In light of the considerable risk, expense, and duration of this litigation, and the impressive results achieved against all odds, I find the request to be reasonable under the circumstances and fully support it.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on August 14, 2023.

/s/ Stuart T. Rossman

Stuart T. Rossman, BBO No. 430640

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al. *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

DECLARATION OF RAKIM BROOKS

I, Rakim Brooks, declare as follows:

1. I am the President of Alliance for Justice, a national alliance of approximately 150 public-interest member organizations that share a commitment to an equitable, just, and free society. Among other things, AFJ works to ensure that the federal judiciary advances core constitutional values and preserves unfettered access to justice for all Americans. I previously served as Campaign Manager for the ACLU's Systemic Equality Campaign and as an associate attorney at Susman Godfrey. I was also a member of the Biden-Harris Transition Team and previously served as a policy advisor for the U.S. Department of the Treasury during the Obama administration. I hold an A.B. from Brown University; an M.Phil in Politics from the University of Oxford, where I was a Rhodes Scholar; and a J.D. and M.B.A. from Yale Law School and the Yale School of Management. I clerked for Justice Edwin Cameron on the Constitutional Court of South Africa and on the U.S. Court of Appeals for the Ninth Circuit and the D.C. Circuit.

2. AFJ has served as a named plaintiff in this class action since its filing in April 2016, a period of more than seven years. For much of that time period, until his departure for a position at the U.S. Senate last year, AFJ's Legal Director Daniel Goldberg oversaw this litigation on AFJ's behalf. Among other things, Mr. Goldberg received updates on

motion practice and court rulings from class counsel, reviewed draft pleadings, consulted on strategy, and provided a declaration in support of class certification on AFJ's behalf. I understand that counsel will seek a service award for AFJ of $10,000. Although our organization did not keep formal time records, it is reasonable to estimate that the value of the attorney time incurred by AFJ over the seven-year life of this case exceeds that amount when calculated at market rates.

3. AFJ supports the proposed class-action settlement and accompanying request for fees, costs, and service awards. Almost by definition, this was a difficult, risky, and ambitious case: a first-ever nationwide class action for monetary relief against the federal judiciary. AFJ would never have decided to sue the federal judiciary lightly. But class counsel were equal to the task and the tenacity and litigation skill they displayed were impressive. Through this seven-year litigation battle, the plaintiffs and class counsel decreased barriers to information about the judicial system, brought information about the PACER paywall to light, spurred ongoing legislative action, created a blueprint for holding the judiciary accountable through litigation, and delivered a landmark monetary settlement to which AFJ is proud to have contributed.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on August 17, 2023.

/s/ Rakim Brooks
Rakim Brooks

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Veterans Legal Services Program v. United States of America

No. 16-745

DECLARATION OF BRIAN T. FITZPATRICK

I. My background and qualifications

1. I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, 2019, and 2023; the Annual Conference of the ABA's

Litigation Section in 2021; and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute. In 2021, I became the co-editor (with Randall Thomas) of THE CAMBRIDGE HANDBOOK ON CLASS ACTIONS: AN INTERNATIONAL SURVEY.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has

been relied upon regularly by a number of courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev.

---

[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp*., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

1151 (2021) (hereinafter "*A Fiduciary Judge*"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "*Class Action Lawyers*"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book published by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively, and that courts should provide proper incentives to encourage such private attorney general behavior. I will also draw upon this work in this declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents; I have attached a list of these documents in Exhibit 3 (and describe there how I refer to them herein). As I explain, based on my study of settlements across the country, I believe the request here is within the range of reason.

II. Case background

6. This is a novel lawsuit against a novel defendant. The defendant is the federal judiciary and the lawsuit alleged that the judiciary was overcharging citizens for access to electronic court records. The lawsuit was filed in 2016. It survived a motion to dismiss and class certification and then prevailed at summary judgment and before an interlocutory appeal in the Federal Circuit. In lieu of a trial on damages, the parties reached a class-wide settlement. The court certified a revised class and preliminarily approved the settlement on May 8, 2023. The parties are now asking the court to grant final approval of the settlement and class counsel is seeking a fee award.

7. The revised class includes, with minor exceptions, "all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018." Settlement Agreement ¶ 3. The class will release the defendant from "any and all claims, known or unknown, that were brought or could have been brought . . . for purported overcharges of any kind arising from their use of PACER during the Class Period" except any for any claims now pending in Fisher v. United States, No. 15-1575 (Fed. Cl.). *Id*. at ¶ 13. In exchange, the defendant will pay $125,000,000 in cash. *See id.* at ¶ 11. After deducting various transaction costs including attorneys' fees and expenses, the balance of this money will be distributed without claim forms in the following manner: first, class members will be repaid all of their PACER fees during the class period up to $350; then, the remaining monies will be divided *pro rata* relative to the amount of PACER fees each class member paid fees in excess of $350. *See id.* at ¶¶ 19-22. If payments go uncashed, they will be divided evenly among check-cashing class members who paid in excess of $350 in PACER fees during the class period; any uncashed monies thereafter will revert back to the defendant. *See id.* at ¶¶ 23-26.

8. Class counsel have now moved the court for an award of attorneys' fees equal to roughly 19% of the cash settlement. It is my opinion that the fee request is more than reasonable in light of the empirical studies and research on economic incentives in class action litigation, especially given the novelty, complexity, and risk of the litigation; the outstanding results obtained; and the high quality and creativity of class counsel's legal work.

III. Percentage versus lodestar method

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes

called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and the like. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is entirely or almost entirely injunctive in nature. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action settlements). The other large-scale academic study of class action fees, authored over time by Geoff Miller and the late Ted Eisenberg, agrees with my findings. *See* Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) ("Eisenberg-Miller 2017") (finding lodestar method used less than 7% of the time since 2009); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action*

Settlements: 1993-2008, 7 J. Empirical L. Stud. 248, 267 (2010) ("Eisenberg-Miller 2010") (finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter and before 2009).

11. The more common method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage of the settlement fund that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach has become the preferred method for awarding fees to class counsel in common fund cases precisely because it corrects the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. These same reasons also drive private parties that hire lawyers on contingency—including sophisticated corporations—to use the percentage method over the lodestar method. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012); Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS 39-40 (1998).

12. Although for many of these reasons the lodestar method has all but been abandoned in common fund cases in the D.C. Circuit, *see Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[W]e join . . . others . . . in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."), any appeals from this litigation go to the Federal Circuit and courts there still have discretion to use either the lodestar method or the percentage method, *see, e.g., Health Republic Ins. Co. v. United States*, 58 F.4th 63 1365, 1371 (2023) ("We have recognized that the Claims Court has discretion to decide what method to use."). Nonetheless, in light of the well-recognized disadvantages of the

lodestar method and the well-recognized advantages of the percentage method, it is my opinion that the percentage method should be used whenever the value of the settlement or judgment can be reliably calculated; the lodestar method should be used only where the value cannot be reliably calculated and the percentage method is therefore not feasible or when the method is required by law, such as by a fee-shifting statute. This is not just my view, but the view of other leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13 (2010) (cmt. b) ("Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar . . . most courts and commentators now believe that the percentage method is superior."). Because this settlement consists of all cash, in my opinion the percentage method should be used here. I will therefore proceed under that method.

IV. Selecting the percentage

13. Courts usually examine a number of factors to select the right percentage under the percentage method. *See* Fitzpatrick, *Empirical Study, supra*, at 832. Neither the D.C. Circuit nor the Federal Circuit has "enumerated what facts must be considered when this method is used," but the Federal Circuit has cited the following factors that are commonly used by the Claims Court: "(1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award." *Health Republic*, 58 F.4th at 1372. These factors are similar to those examined in this Court, *see, e.g., In re Baan Co. Securities Litig.*, 288 F.Supp.2d 14, 17 (D.D.C. 2003); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *11 (D.D.C. July 16, 2001), and I will therefore use them here. In my opinion,

the fee request is reasonable because it is supported by all the relevant factors that can be determined at this time.[2]

14. Consider first factors "(4) the fee that likely would have been negotiated between private parties in similar cases"; "(6) the percentage applied in other class actions"; and "(7) the size of the award." The request here is about 19% of the settlement. It is well known that this is well below what private parties negotiate when they hire lawyers on contingency. *See, e.g.,* Kritzer, SUPRA, at 39-40 (finding most percentages at one-third). Professor Kritzer's data is largely drawn from personal injury cases, but, even when sophisticated corporations hire lawyers on contingency for complex litigation like patent cases, they agree to pay more than 19%. *See, e.g.,* Schwartz, *supra*, at 360 (2012) (finding the average fixed percentage to be 38.6% and the average escalating percentage to rise from 28% upon filing to 40.2% through appeal).

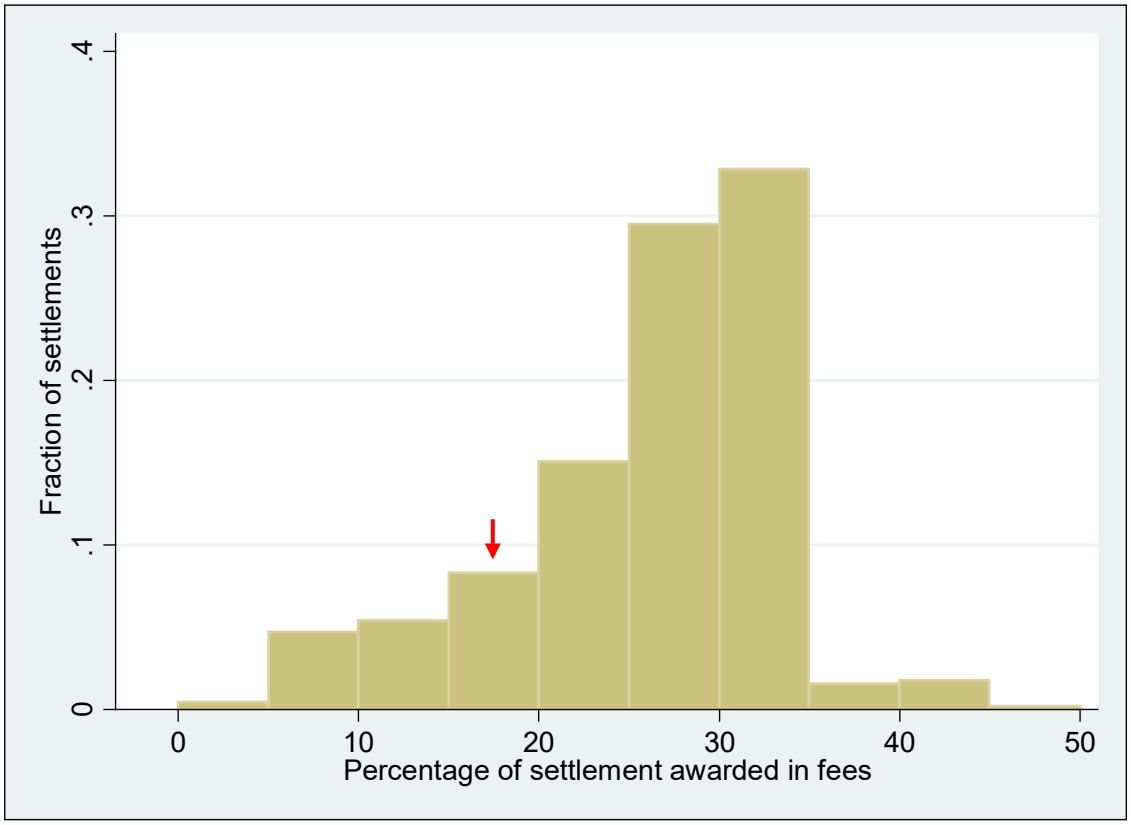
15. Although fee percentages tend to be lower in class actions than in individual litigation, the request here is below even what is typical in class actions. According to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. This can be seen graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study.[3] In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The request here would fall into the bar depicted by the red arrow. Tallying up the other bars shows that *over 80%* of all percentage method fee awards

[2] The fifth factor—"(5) class members' objections to the settlement terms or fees requested by class counsel"—is not yet applicable because the deadline to file an objection has not yet passed.

[3] Although it would normally be instructive to examine fee awards within the circuit as well as those nationwide, no circuit sees fewer class actions than the D.C. and Federal Circuits. *See* Fitzpatrick, *Empirical Study, supra* at 822. Thus, in my opinion, intracircuit analysis would not be meaningful here.

were greater than or equal to the request here (and often much greater). This means that, if the request here is granted, it would fall into the *bottom fifth* of fees awarded by federal courts. My numbers largely agree with the other large-scale academic studies of class action fee awards, which, if anything, show even higher typical awards in more recent years. *See Eisenberg-Miller 2010*, *supra,* at 260 (finding mean and median of 24% and 25%, respectively through 2008); *Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of 27% and 29% respectively, from 2009 to 2013). Thus, in my opinion, these factors clearly support the fee request.

Figure 1: Percentage-method fee awards among all federal courts, 2006-2007



16. But it should be noted that the settlement here is unusually large. Less than 10% of class action settlements total over $100 million in any given year. *See* Fitzpatrick, *Empirical Study, supra,* at 839. This is notable because some federal courts award lower percentages in cases where settlements are larger. *See id*. at 838, 842-44 (finding relationship statistically significant);

Case 1:16-cv-00745-PLF Document 158-4 Filed 08/28/23 Page 10 of 71

Eisenberg-Miller 2017, supra, at 947-48 (same); *Eisenberg-Miller 2010*, *supra*, at 263-65 (same). For several reasons, this does not change my opinion that this factor weighs in favor of the fee request.

17. First, I think the entire endeavor of lowering fee percentages simply because a settlement is large is misguided: it creates terrible incentives for class counsel. Indeed, it can actually make class counsel *better off* by resolving a case for less rather than more if it is not done only on the margin (e.g., only for the *portion* above $100 million). *See, e.g.*, *In re Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001) (Easterbrook, J.) ("This means that counsel for the consumer class could have received [more] fees had they settled for [less] but were limited . . . in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."). Consider the following example: if courts award class action attorneys 25% of settlements in cases that settle for less than $100 million, but 18% of settlements when they are over $100 million (the averages I found in my study, see below), then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $22.5 million fee award) than for $110 million (*i.e.*, a $19.8 million fee award). As Judge Easterbrook noted above, rational clients who want to maximize their own recoveries would never agree to such an arrangement. This is why studies even of sophisticated corporate clients do not report any such practice among them when they hire lawyers on contingency, even in the biggest cases like patent litigation. *See, e.g.,* Schwartz, *supra,* at 360; Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1159-63. In my opinion, courts should not force a fee arrangement on class members that they would never choose themselves. To the contrary: courts are supposed to be serving as fiduciaries for absent class members. *See* William B. Rubenstein, Newberg and Rubenstein on Class Actions § 13.40 (6th ed. 2022) ("[T]he law requires the judge to act as a fiduciary" for class members). This is all

the more imperative in the Federal Circuit in light of factor (4): "the fee that likely would have been negotiated between private parties in similar cases." Private parties simply do not pay worse percentages for better results.

18. Second, while some courts have awarded lower fee percentages as settlement sizes increase, many other courts do not follow this practice. *See, e.g.*, *Allapattah Srvcs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit . . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, 2013 WL 12327929, at 17 n. 16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with … other courts, e.g., *Allapattah Servs*., 454 F. Supp. 2d at 1213, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class"). Nothing in Federal Circuit or D.C. Circuit case law requires district courts to lower fee percentages because class counsel did a better job and recovered more for the class. Accordingly, it is my humble opinion that the Court should not exercise its discretion to do so here.

19. Nonetheless, if the Court wishes to go down this path, it is my opinion that the percentage requested here is still in line with those awarded in other class action cases. The settlement range from my study that this settlement falls into is the range between $100 million and $250 million (inclusive). According to my study, the mean and median fee percentages

awarded in settlements in this range were 17.9% and 16.9%, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 839. The fee request here is only slightly above these numbers and well within one standard deviation (5.2%, *see id.*) of the mean. Moreover, the fee request is actually below the average percentage from the Eisenberg-Miller studies in the relevant range used there, which is better centered around the fee request here. *See Eisenberg-Miller 2010, supra*, at 265 (finding mean of 19.4% and median of 19.9% for settlements between $69.6 and $175.5. million). In my opinion, this makes the request here a mainstream one even among settlements of the same size. Thus, no matter how you slice it, it is my opinion that these factors support the fee request.

20. Consider next the factors that go to the results obtained by class counsel in light of the risks presented by the litigation: "(1) the quality of counsel," "(2) the complexity and duration of the litigation," and "(3) the risk of nonrecovery." As I noted, the recovery here is very large, but whether or not it is a good recovery depends on the underlying damages the class might have recovered at trial discounted by the risks the class faced. According to class counsel, the absolute maximum possible recoverable damages here following the Federal Circuit's decision were around $500 million. Moreover, that total consists largely of expenditures for CM/ECF, which is a highly uncertain category of potential damages after the Federal Circuit's decision. Further, the defendant took the position that no damages of *any* kind had been established or could be established at trial. Thus, the class is recovering 25% of what they might have received at trial had everything gone their way. In my opinion, this recovery is outstanding in light of the risks the class faced from the very beginning of this litigation and continued to face going forward. As I noted at the outset, this was a novel lawsuit against a novel defendant. I am very familiar with the challenges that lawyers face when they try to sue the federal government for money. I teach a unit on it every year in Federal Courts. As I tell my students (and paraphrasing *The Great Gatsby*): the federal government

is very different from you and me. The federal government has defenses that no one else has. But even that understates what class counsel was up against here. When I teach Federal Courts, I teach suing the Executive branch. Suing the Judicial branch is almost unheard of. In all my years of studying class actions and litigation against the federal government, I am not aware of any previous class action that has successfully been brought against the federal judiciary. Thus, every step of this lawsuit required a new trail to be cut. Not only procedurally—Did the Court have jurisdiction? Was there a cause of action? Did the judiciary have sovereign immunity?—but also on the merits—How should the E-Government Act be interpreted? How can any violation of it be proved? None of these questions were even 50-50 propositions for the class when this litigation began. People had been complaining about high PACER fees for years, but no one had invented a legal solution to the problem until class counsel did. In my opinion, recovering 25% of the class's maximum possible losses in the face of these risks is nothing short of remarkable.

21. Truth be told, all of the above, as impressive as it is, understates class counsel's success here. Shortly after class counsel won their appeal, the government eliminated PACER fees for 75% of users and Congress reinvigorated efforts to make PACER free. Yet, class counsel is not seeking any percentage of those benefits. Moreover, few class action lawyers are willing to litigate their cases through summary judgment and an appeal; the typical class action settles in only three years. *See* Fitzpatrick, *Empirical Study, supra*, at 820. Yet, class counsel is seeking a typical-to-less-than-typical fee percentage. Thus, all these factors, too, clearly support class counsel's fee request.

V. The lodestar crosscheck?

22. Class counsel's lodestar is not one of the factors listed above. Nonetheless, a significant minority of courts use the so-called "lodestar crosscheck" with the percentage method,

see Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck), and the Federal Circuit recently hinted that its courts might want to do it, too. *See Health Republic*, 58 F.4th at 1374 n.2 ("We need not decide whether a lodestar cross-check would be required . . . had there been no class notices requiring it. It is evident, however, that the policies that govern [a] percentage-of-the-fund attorney's fee . . . might well call for a lodestar cross-check . . . as a general matter."). As such, I wish to say a few words about it.

23. To begin with, in my opinion, economic theory shows that the lodestar crosscheck is a mistake. It brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place. *See* Fitzpatrick, *A Fiducairy Judge, supra*, at 1167.

24. Consider the following examples. Suppose a lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be *rationally indifferent* between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members. Or suppose counsel believed that the most he could wring from the defendant in this example was $16 million. In order to reap the maximum 25% fee with the lodestar crosscheck, he would have to generate an additional $1 million in lodestar before agreeing

to the settlement; this would give him incentive to *drag the case out* before sealing the deal. Again, dragging cases along for nothing is not good for class members.

25. This is why the marketplace does not use the lodestar crosscheck when they hire lawyers on contingency. Professor Schwartz did not report any crosscheck agreements in his study of patent litigation. Professor Kritzer has never reported any in his studies of contingency fees more broadly. The Seventh Circuit thinks it is so irrational it has all but banned the practice for the same reason it banned the bigger-recovery-begets-smaller-fee practice I discussed above. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (holding that "a lodestar check is not . . . required methodology" because "[t]he . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*"). To the extent the court should be guided by factor (4)—"the fee that likely would have been negotiated between private parties in similar cases"—it should therefore not be guided by the lodestar crosscheck.

26. I nonetheless understand the very human temptation to use the lodestar crosscheck. When class action lawyers generate significant returns on their time—what some courts, in hindsight, call "windfalls"—it invites public and media scrutiny. But when other entrepreneurs and investors succeed in their ventures, no one asks them: How many hours did you spend on this venture? What effective hourly rate did you earn? Should we take some of it away from you because it is "too high"? Class action lawyers are investors just like any others; they just invest their time and resources for others (the class members) with no hope of payment unless they achieve some form of success for those others. In my opinion, courts should not bow to the pressure and ask these questions of class counsel, either. Rather, courts should only ask what is best for class counsel's incentives vis-à-vis class members. For example, at the outset of this

litigation, would class members have objected to paying class counsel 19% of whatever was recovered here? We do not have to guess at the answer: despite the opportunity to opt out when they received the class certification notice advising them of a fee request *even greater* than this one, the original class—which, it should be noted, are largely sophisticated parties like lawyers and large institutions—decided not to opt out: "By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court." *See* ECF Nos. 43-1, 44. And the new class members are currently being given the same chance.

27. But because class counsel put their lodestar into the record, I will briefly address whether class counsel would reap some sort of "windfall" if their fee request were granted. Class counsel's lodestar has thus far summed to some $5.13 million. Based on the complexity of the case and the large number of questions already received from class members about the settlement, as well as the possibility of responding to objections and handling a potential appeal therefrom, they anticipate another $900,000 in time to get through the end of the settlement distribution, resulting in a total estimated lodestar of about $6.03 million. If the fee request is granted, class counsel would therefore receive a multiplier of around 3.9. Although this would be above average, *see* Fitzpatrick, *Empirical Study, supra*, at 834; *Eisenberg-Miller 2010, supra*, at 274, it would be well within the range of previous cases. *See Health Republic*, 58 F.4th at 1374 ("A number of courts have surveyed relevant fee awards and noted a norm of implicit multipliers in the range of 1 to 4."); *see also, e.g.*, *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (awarding fee even though "[t]he Court is aware that a lodestar cross-check would likely result in a multiplier of around 10.96"); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (ECF 65) (same with 10.26 multiplier); *Beckman*

v. KeyBank, N.A., 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-cv-00011 (D.N.J., Jan. 26, 2015) (awarding fee with 8.91 multiplier); *Raetsch v. Lucent Tech., Inc.*, No. 05-cv-05134 (D.N.J., Nov. 8., 2010) (same with 8.77 multiplier); *Thacker v. Chesapeake Appalachia, L.L.C.*, No. 07-cv-00026 (E.D.Ky. Mar. 3, 2010) (same with 8.47 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (same with 8.3 multiplier); *Hainey v. Parrott*, 2007 WL 3308027, at *1 (S.D. Ohio Nov. 6, 2007) (same with 7.47 multiplier); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3rd Cir.2001) (same with of 7 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587 (E.D.Pa.2005) (same with 6.96 multiplier); *Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee with 6.85 multiplier); *In re IDB Communication Group, Inc., Sec. Litig.*, No. 94-3618 (C.D.Cal. Jan. 17, 1997) (awarding fee with 6.2 multiplier); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (same with 6 multiplier); *In re RJR Nabisco*, 1992 WL 210138 (same); *In re Charter Communications, Inc., Securities Litigation*, 2005 WL 4045741, *18 (E.D.Mo. 2005) (same with 5.61 multiplier); *Roberts v. Texaco, Inc*., 979 F.Supp. 185, 197 (S.D.N.Y.1997) (same with 5.5 multiplier); *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 3463337 at *10 (S.D.Tex. Dec.18, 2001) (same with 5.3 multiplier).

28. Moreover, in light of the extreme risks involved here, the multiplier that would result here would actually be below what would have been needed to properly incentivize this contingency representation; that number is the inverse of the riskiness of the case. *See* William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation*,

23 J. Legal Stud. 185, 209 & n.18 (1994) ("[T]he multiplier must be [divided by] p*, the probability of winning an efficiently prosecuted case . . . ."). Finally, it bears noting that class counsel have been litigating this case for seven years without any payment at all. It is hardly a "windfall" to work seven years without payment only then to end up paid less than the multiple that would be justified by the risks you successfully surmounted during those seven years. Thus, in my opinion, even the lodestar crosscheck supports class counsel's fee request.

VI. Conclusion

29. For all these reasons, it is my opinion that class counsel's fee request is reasonable in light of the empirical studies and research on economic incentives.

30. My compensation in this matter is a flat fee in no way dependent on the outcome of class counsel's fee petition.

August 28, 2023

Brian T. Fitzpatrick

Nashville, TN

EXHIBIT 1

BRIAN T. FITZPATRICK
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-4032
brian.fitzpatrick@law.vanderbilt.edu

ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *FedEx Research Professor*, 2014-2015
- *Professor of Law*, 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019) (winner of the Pound Institute's 2022 Civil Justice Scholarship Award)

BOOK CHAPTERS

Climate Change and Class Actions in CLIMATE LIBERALISM: PERSPECTIVES ON LIBERTY, PROPERTY, AND POLLUTION (Jonathan Adler, ed., Palgrave Macmillan 2023)

How Many Class Actions are Meritless?, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (ed., with Randall Thomas, Cambridge University Press 2021)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, in THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (ed., with Randall Thomas, Cambridge University Press 2021) (with Randall Thomas)

Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC ARTICLES

Distributing Attorney Fees in Multidistrict Litigation, 13 J. Leg. Anal. 558 (2021) (with Ed Cheng & Paul Edelman)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, 89 FORD. L. REV. 1151 (2021)

Many Minds, Many MDL Judges, 84 L. & Contemp. Problems 107 (2021)

Objector Blackmail Update: What Have the 2018 Amendments Done?, 89 FORD. L. REV. 437 (2020)

Why Class Actions are Something both *Liberals* and *Conservatives Can Love*, 73 VAND. L. REV. 1147 (2020)

Deregulation and Private Enforcement, 24 LEWIS & CLARK L. REV. 685 (2020)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, 40 NW. J. INT'L L. & BUS. 203 (2020) (with Randall Thomas)

Can the Class Action be Made Business Friendly?, 24 N.Z. BUS. L. & Q. 169 (2018)

Can and Should the New Third-Party Litigation Financing Come to Class Actions?, 19 THEORETICAL INQUIRIES IN LAW 109 (2018)

Scalia in the Casebooks, 84 U. CHI. L. REV. 2231 (2017)

The Ideological Consequences of Judicial Selection, 70 VAND. L. REV. 1729 (2017)

Judicial Selection and Ideology, 42 OKLAHOMA CITY UNIV. L. REV. 53 (2017)

Justice Scalia and Class Actions: A Loving Critique, 92 NOTRE DAME L. REV. 1977 (2017)

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

An Empirical Look at Compensation in Consumer Class Actions, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan, 53 Baylor L. Rev. 289 (2001)

ACADEMIC PRESENTATIONS

Non-Securities Class Action Settlements in CAFA's First Eleven Years, University of Florida Law School, Gainesville, FL (Feb. 6, 2023)

Entrapment of the Little Guy: Resisting the Erosion of Investor, Employee and Consumer Protections, Institute for Law and Economic Policy, San Diego, CA (Jan. 27, 2023)

A New Source of Data for Non-Securities Class Actions, William & Mary Law School, Williamsburg, VA (Nov. 10, 2022)

Can Courts Avoid Politicization in a Polarized America?, American Bar Association Annual Meeting, Chicago, IL (Aug. 5, 2022) (panelist)

A New Source of Data for Non-Securities Class Actions, Seventh Annual Civil Procedure Workshop, Cardozo Law School, New York, NY (May 20, 2022)

Resolution Issues in Class Actions and Mass Torts, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Mar. 11, 2022) (panelist)

Developments in Discovery Reform, George Mason Law & Economics Center Fifteenth Annual Judicial Symposium on Civil Justice Issues, Charleston, SC (Nov. 16, 2021) (panelist)

Locality Litigation and Public Entity Incentives to File Lawsuits: Public Interest, Politics, Public Finance or Financial Gain?, George Mason Law & Economics Center Symposium on Novel Liability Theories and the Incentives Driving Them, Nashville, TN (Oct. 25, 2021) (panelist)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, University of California Hastings College of the Law, San Francisco, CA (Nov. 3, 2020)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

Racial Preferences Won't Go Easily, WALL ST. J. (June 1, 2023)

Memo to Mitch: Repeal the Republican Tax Increase, THE HILL (July 17, 2020)

The Right Way to End Qualified Immunity, THE HILL (June 25, 2020)

I Still Remember, 133 HARV. L. REV. 2458 (2020)

Proposed Reforms to Texas Judicial Selection, 24 TEX. R. L. & POL. 307 (2020)

The Conservative Case for Class Actions?, NATIONAL REVIEW (Nov. 13, 2019)

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Abstention, Tennessee Attorney General's Office Continuing Legal Education, Nashville, TN (Apr. 13, 2022)

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Legal Studies
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Referee, Supreme Court Economic Review
Reviewer, Aspen Publishing
Reviewer, Cambridge University Press
Reviewer, University Press of Kansas
Reviewer, Palgrave Macmillan
Reviewer, Oxford University Press
Reviewer, Routledge
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015
Board of Directors, Tennessee Stonewall Bar Association, 2012-2022
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia & California (inactive)

COMMUNITY ACTIVITIES

Board of Directors, Beacon Center, 2018-present; Board of Directors, Nashville Ballet, 2011-2017 & 2019-2022; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

Case 1:22-cv-00745-PLF Document 158-4 Filed 08/28/23 Page 2 of 41

JOURNAL OF EMPIRICAL LEGAL STUDIES

Journal of Empirical Legal Studies
Volume 7, Issue 4, 811–846, December 2010

An Empirical Study of Class Action Settlements and Their Fee Awards

*Brian T. Fitzpatrick**

This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

*Vanderbilt Law School, 131 21st Ave. S., Nashville, TN 37203; email: brian.fitzpatrick@vanderbilt.edu.

Research for this article was supported by Vanderbilt's Cecil D. Branstetter Litigation & Dispute Resolution Program and Law & Business Program. I am grateful for comments I received from Dale Collins, Robin Effron, Ted Eisenberg, Deborah Hensler, Richard Nagareda, Randall Thomas, an anonymous referee for this journal, and participants at workshops at Vanderbilt Law School, the University of Minnesota Law School, the 2009 Meeting of the Midwestern Law and Economics Association, and the 2009 Conference on Empirical Legal Studies. I am also grateful for the research assistance of Drew Dorner, David Dunn, James Gottry, Chris Lantz, Gary Peeples, Keith Randall, Andrew Yi, and, especially, Jessica Pan.

[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

Appx4179

Case: 24-1057 Document: 32-2 Page: 232 Filed: 12/03/2024 (232 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 232 of 571

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

---

[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

Case: 24-1057 Document: 32-2 Page: 233 Filed: 12/26/2024 (233 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 233 of 257

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

---

[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

Case: 24-1057 Document: 32-2 Page: 234 Filed: 08/23/2024 (234 of 571)

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

---

[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

Case: 24-1057 Document: 32-2 Page: 235 Filed: 12/03/2024 (235 of 371)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 235 of 371

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

---

[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

Case 1:24-cv-10745-PBS Document 32-2 Filed 08/23/24 Page 236 of 394

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

---

[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

Case: 24-1057 Document: 32-2 Page: 237 Filed: 12/23/2024 (237 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 237 of 257

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

---

[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

Case: 24-1057 Document: 32-2 Page: 238 Filed: 12/03/2024 (238 of 241)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 238 of 241

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

Case: 24-1057 Document: 32-2 Page: 239 Filed: 12/06/2024 (239 of 271)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 239 of 271

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

---

[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

Case: 24-1057 Document: 32-2 Page: 240 Filed: 12/06/2024 (240 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 240 of 257

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

Case: 24-1057 Document: 32-2 Page: 241 Filed: 12/03/2024 (241 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 241 of 257

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

---

[43]See Eisenberg & Miller, supra note 15, at 59–60.

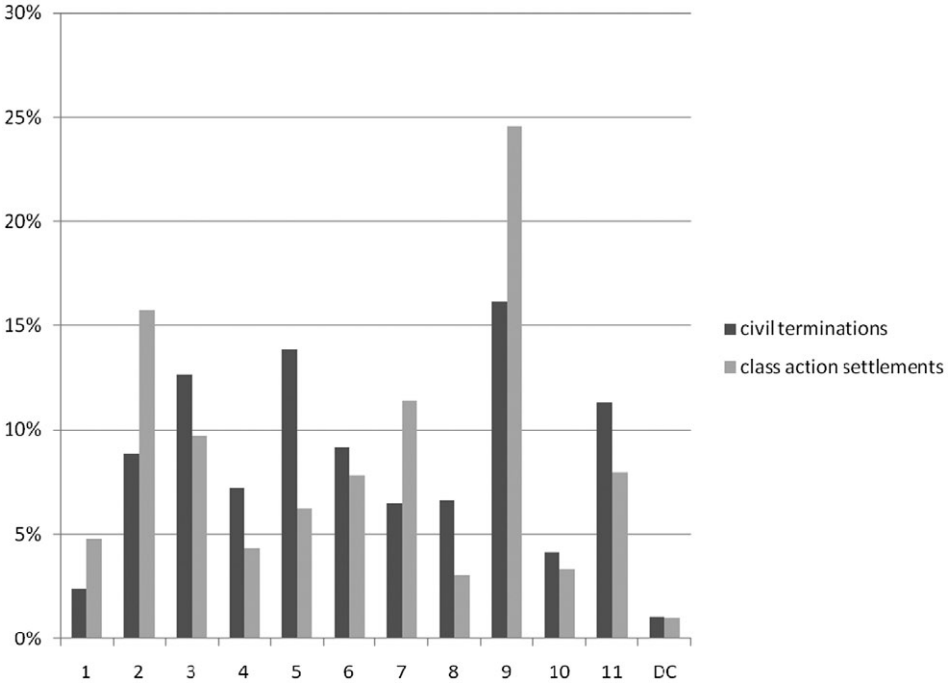
[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Case: 24-1757 Document: 32-2 Page: 242 Filed: 12/03/2024 (242 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 242 of 571

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

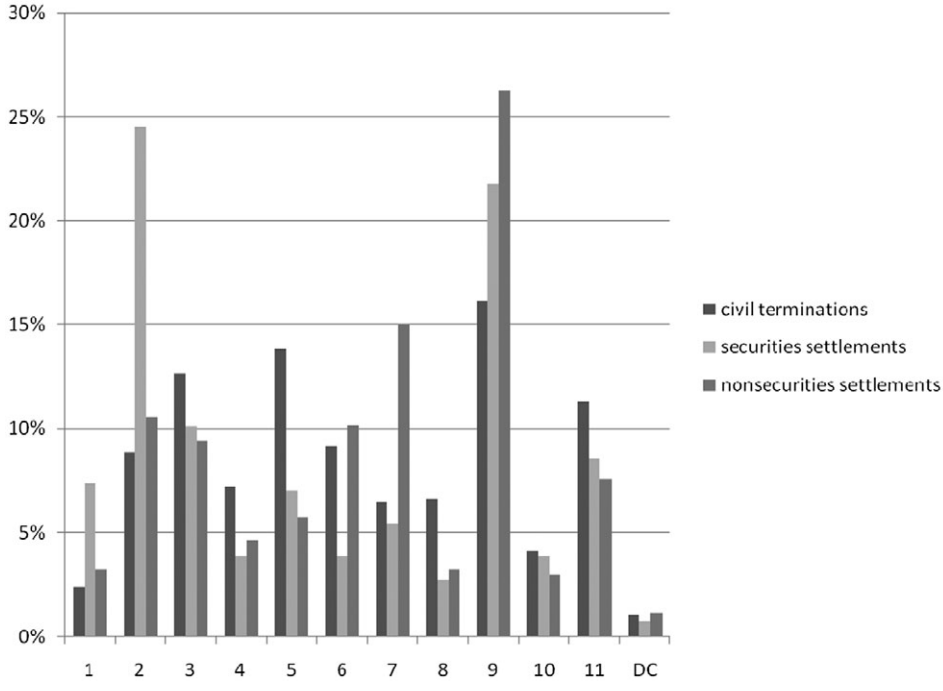
believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Case: 24-1057 Document: 32-2 Page: 243 Filed: 12/26/2024 (243 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 243 of 257

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

Case: 24-1057 Document: 32-2 Page: 244 Filed: 08/23/2024 (244 of 271)

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

Case: 24-1057 Document: 32-2 Page: 245 Filed: 12/23/2024 (245 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 245 of 257

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

Case: 24-1057 Document: 32-2 Page: 246 Filed: 08/23/2024 (246 of 271)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 246 of 271

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

---

[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

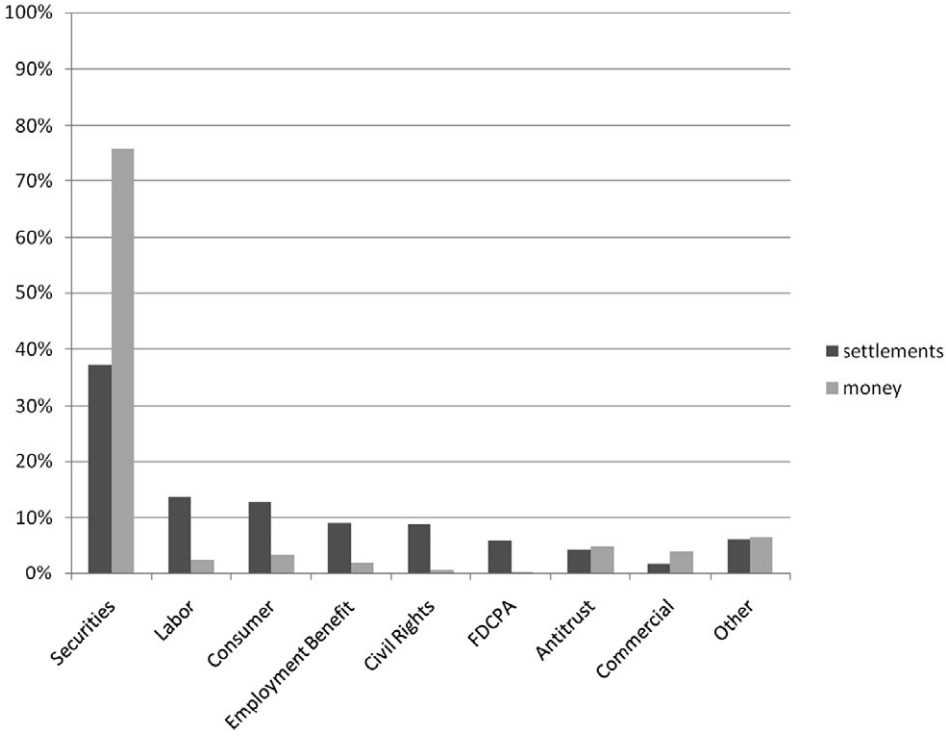
[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Case: 24-1057 Document: 32-2 Page: 247 Filed: 12/03/2024 (247 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 247 of 571

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

---

($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Case: 24-1057 Document: 32-2 Page: 248 Filed: 12/23/2024 (248 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 248 of 571

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

---

[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

Case: 24-1057 Document: 32-2 Page: 250 Filed: 12/06/2024 (250 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 250 of 257

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Case: 24-1057 Document: 32-2 Page: 251 Filed: 12/03/2024 (251 of 514)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 251 of 514

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

Case: 24-1057 Document: 32-2 Page: 252 Filed: 12/03/2024 (252 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 252 of 571

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

---

[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

Case: 24-1057 Document: 32-2 Page: 253 Filed: 12/26/2024 (253 of 257)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 253 of 257

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

---

[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

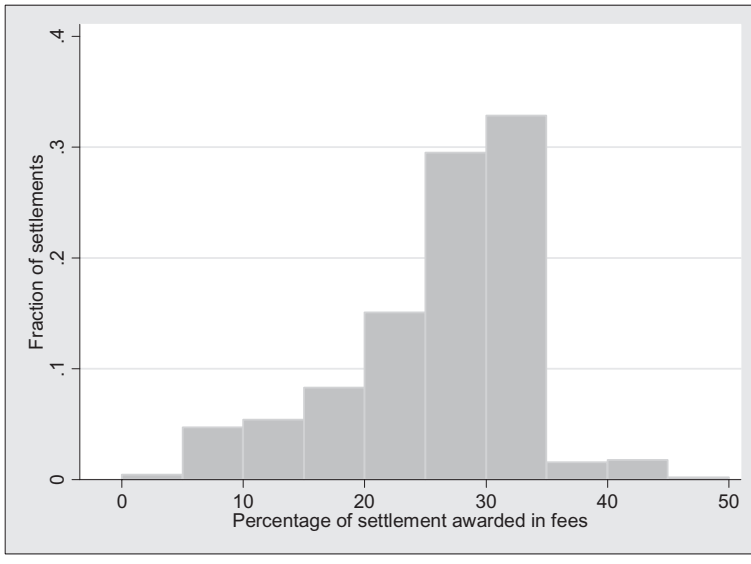
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Case: 24-1057 Document: 32-2 Page: 255 Filed: 12/03/2024 (255 of 324)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 255 of 324

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

Sources: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Case: 24-1057 Document: 32-2 Page: 256 Filed: 12/06/2024 (256 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 256 of 571

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

Sources: Westlaw, PACER, district court clerks' offices.

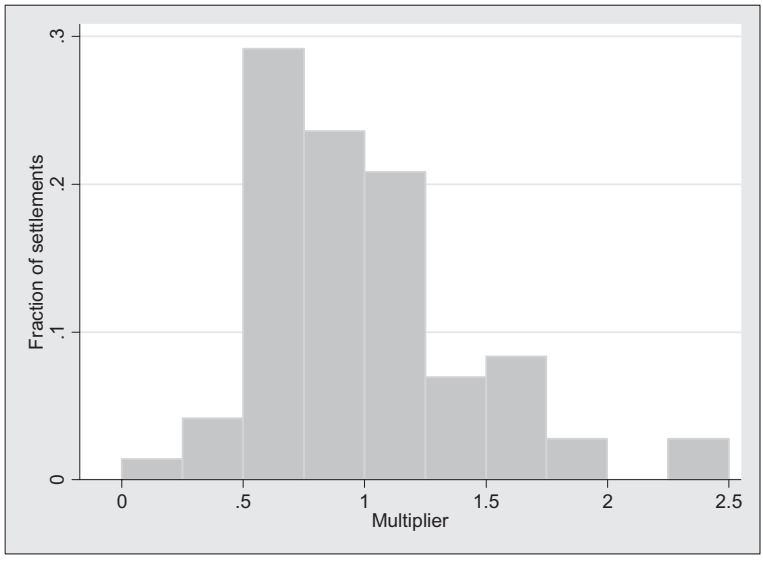
settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Case: 24-1057 Document: 32-2 Page: 257 Filed: 12/03/2024 (257 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 257 of 571

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

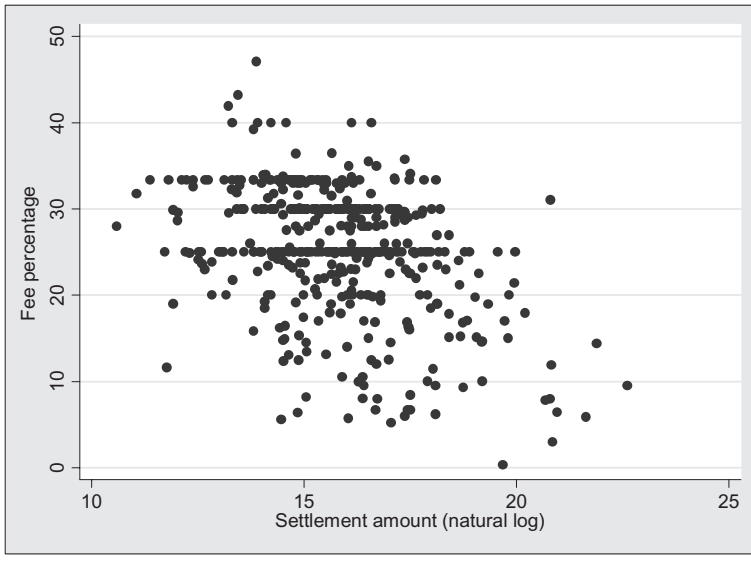
are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

---

[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Case: 24-1057 Document: 32-2 Page: 259 Filed: 12/06/2024 (259 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 259 of 571

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

Sources: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

Sources: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

---

[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

Case: 24-1057 Document: 32-2 Page: 261 Filed: 12/06/2024 (261 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 261 of 571

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

---

appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Case: 24-1057 Document: 32-2 Page: 262 Filed: 12/03/2024 (262 of 351)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 262 of 351

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

Case: 24-1057 Document: 32-2 Page: 264 Filed: 12/06/2024 (Page 264 of 571)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 264 of 571

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

---

[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

Case: 24-1057 Document: 32-2 Page: 265 Filed: 12/03/2024 (265 of 324)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/28/24 Page 265 of 324

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

---

[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

Case: 24-1057 Document: 32-2 Page: 266 Filed: 12/06/2024 (266 of 391)
Case 1:24-cv-00745-PLF Document 32-2 Filed 08/23/24 Page 266 of 391

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

EXHIBIT 3

Documents reviewed:

- Memorandum Opinion (document 25, filed 12/5/16)
- Memorandum Opinion (document 33, filed 1/24/17)
- Memorandum Opinion (document 89, filed 3/31/18)
- Opinion, No. 19-1081 (Fed. Cir., Aug. 6, 2020)
- Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement (document 148, filed 4/12/23)
- Revised Declaration of Deepak Gupta (document 149, filed 4/12/23), including Exhibit A ("Settlement Agreement")
- Order Granting Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement (document 153, filed 5/8/23)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

DECLARATION OF DEEPAK GUPTA

I, Deepak Gupta, declare as follows:

1. I am the founding principal of Gupta Wessler LLP, one of the two law firms appointed as lead class counsel by this Court on January 24, 2017. *See* ECF Nos. 32 & 33. Along with my partner Jonathan E. Taylor and our co-counsel at Motley Rice LLC, I have represented the plaintiffs throughout this litigation. I am submitting this declaration in support of the plaintiffs' motion for final approval of the class settlement and for attorneys' fees, costs, and service awards. This declaration is accompanied by four exhibits: a copy of the executed settlement agreement (Exhibit A), a copy of the executed supplemental agreement (Exhibit B), a copy of a second amendment making further technical modifications (Exhibit C), a copy of my law firm biographical page (Exhibit D), and a copy of my colleague Jonathan Taylor's biographical page (Exhibit E).

Background on PACER Fees

2. The Administrative Office of the U.S. Courts (AO) requires people to pay fees to access records through its Public Access to Court Electronic Records system, commonly known as

PACER. This lawsuit was brought to challenge the lawfulness of those fees for one reason: the fees far exceed the cost of providing the records.

3. By statute, the federal judiciary has long had the authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then set at $.07 per page) were "higher than the marginal cost of disseminating the information." S. Rep. 107-174, at 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.* To this end, Congress passed the E-Government Act of 2002, which amended the statute by authorizing fees "only to the extent necessary." 28 U.S.C. § 1913 note.

4. Despite this statutory limitation designed to *reduce* PACER fees, the AO twice *increased* PACER fees in the years after the E-Government Act's passage—first to $.08 per page and then to $.10 per page. And it did so over a period when the costs of electronic data storage plunged exponentially.

5. The result has been a widely unpopular PACER fee regime that has hindered equal access to justice, imposed serious barriers for low-income and *pro se* litigants, discouraged academic research and journalism, and thus inhibited public understanding of the courts. And the AO has further compounded those harms by discouraging fee waivers, even for pro se litigants, journalists, researchers, and nonprofits; by prohibiting the free transfer of information by those who obtain waivers; and by hiring private collection lawyers to sue people who could not afford to pay the fees.

6. I first became aware of the practical problems and dubious legality of PACER fees, and first considered whether litigation could be brought to address the issue, when I was a staff attorney at the nonprofit Public Citizen Litigation Group between 2005 and 2011. Government transparency was among the group's specialties, and I followed the efforts of Carl Malamud of Public.Resource.org, who led a sustained campaign to draw public attention to PACER fees and

persuade the AO to make PACER free. As I recall, my colleagues and I considered the possibility of bringing litigation to challenge PACER fees but were unable to identify a viable legal path.

7. Until this case was filed, litigation against the federal judiciary was not seen as a realistic way to bring about reform of the PACER fee regime, for at least three main reasons. First, the judiciary has statutory authority to charge at least *some* amount in fees, so litigation alone could never result in a free PACER system—the ultimate goal of reformers. Second, few practicing litigators, let alone those who specialize in complex federal litigation, were likely to be eager to sue the federal judiciary and challenge policy decisions made by the Judicial Conference of the United States. They were even less likely to commit considerable time and resources to litigation when the prospect of recovery was so uncertain. Third, even if PACER fees could be shown to be excessive and even if qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. And advocates were unable to identify an alternative basis for jurisdiction, a cause of action, and a waiver of sovereign immunity to challenge PACER fees in court.

8. I am aware of only one previous lawsuit directly challenging the PACER fee schedule; that suit was dismissed for lack of jurisdiction. *See Greenspan v. Admin. Office*, No. 14-cv-2396 (N.D. Cal.). I am also aware of one previous effort to challenge the AO's policy on fee waivers, which also foundered on jurisdiction. In 2012, journalists at the Center for Investigative Reporting applied "for a four-month exemption from the per page PACER fee." *In re Application for Exemption from Elec. Pub. Access Fees*, 728 F.3d 1033, 1035–36 (9th Cir. 2013). They "wanted to comb court filings in order to analyze 'the effectiveness of the court's conflict-checking software and hardware to help federal judges identify situations requiring their recusal,'" and they "planned to publish their findings" online. *Id.* at 1036. But their application was denied because policy notes accompanying

the PACER fee schedule instruct courts not to provide a fee waiver to "members of the media." *Id.* at 1035. The Ninth Circuit held that it could not review the denial. *Id.* at 1040.

9. With litigation seemingly unavailable as a pathway, advocates for PACER reform had largely devoted their efforts to grassroots and technological strategies: making certain records available in an online database that could be accessed for free, downloading records in bulk, or mounting public-information campaigns to expand access. At one point, for example, when the judiciary initiated a free trial of PACER at several libraries, Carl Malamud encouraged activists "to push the court records system into the 21st century by simply grabbing enormous chunks of the database and giving the documents away." John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. Times (Feb. 12, 2009). An enterprising 22-year-old activist named Aaron Swartz managed to download millions of documents before the AO responded by pulling the plug on the free trial and calling in the FBI to investigate Swartz. *Id.* This heavy-handed response was seen by many as motivated by a desire to protect fee revenue at the expense of public access. Today, the Free Law Project and the Center for Information Technology Policy at Princeton University operate a searchable collection of millions of PACER documents and dockets that were gathered using their RECAP software, which allows users to share the records they download.

10. These efforts have been important in raising public awareness, and ameliorating the effects of PACER fees, but they have not eliminated or reduced the fees themselves. To the contrary, the fees have only continued on their seemingly inexorable—and indefensible—rise.

Overview of this Litigation

11. Then came this case. On April 21, 2016, three nonprofits filed this lawsuit, asking this Court to declare that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges during the limitations period. They sued under the Little Tucker Act, 28 U.S.C. § 1346(a), which waives sovereign immunity and "provides jurisdiction to recover an

illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996). Because that Act provides jurisdiction only for claims seeking monetary relief based on past overcharges, and because the judiciary is not subject to the APA, *see* 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek any injunctive relief or other relief requiring the judiciary to lower PACER fees going forward. They therefore limited their requested relief to retroactive monetary relief.

12. From the start, the plaintiffs were represented by a team of lawyers at our firm, Gupta Wessler LLP, a litigation boutique with experience bringing complex cases involving the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. By the time that we filed this lawsuit together (as further detailed in my declaration in support of class certification, ECF No. 8-1, and as described further below), the two law firms together had an unparalleled combination of experience and expertise in prosecuting class claims for monetary relief against the federal government.

13. In its first year, the litigation met with early success when this Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF Nos. 24 & 25. A month later, on January 24, 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' Little Tucker Act illegal-exaction claim for classwide treatment and appointed my firm and Motley Rice as co-lead class counsel. *Id.*

14. The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (KCC) as claims administrator. ECF Nos. 37 & 42. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, about 1,100 opted out of the class.

15. Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only a category labeled by the judiciary as "Public Access Services," but also the following categories of expenses: "Case Management/Electronic Case Files System" (CM/ECF); "Electronic Bankruptcy Notification" (EBN); "Communications Infrastructure, Services, and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under the heading "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi."

16. The parties subsequently filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to "disseminating information through electronic means." ECF No. 89 at 24.

17. On March 31, 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [such] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "properly used PACER fees to pay for CM/ECF and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

18. Within months, the judiciary took steps "to implement the district court's ruling" and "to begin transitioning disallowed expenditures from the [PACER] program to courts' Salaries

and Expenses appropriated funding." *See FY 2018 Judiciary Report Requirement on PACER, July 2018*, at 4, attached to Letter from Dir. Duff to Hons. Frelinghuysen, Graves, Lowey, & Quigley (July 19, 2018), https://perma.cc/CP8S-XRVQ. In July 2018, the AO's Director informed the House Appropriations Committee that, "beginning in FY 2019, Courtroom Technology, Web-based Juror Services, and Violent Crime Control Act Notification categories will no longer be funded" with PACER fees, "to reduce potential future legal exposure." *Id.* "The Judiciary will instead seek appropriated funds for those categories." *Id.*

19. Meanwhile, both parties sought permission for an interlocutory appeal from this Court's decision, and the U.S. Court of Appeals for the Federal Circuit accepted both appeals to decide the scope of the statutory authorization to charge fees. The parties adhered to their same interpretations of the statute on appeal. In addition, the government argued that the court lacked jurisdiction, so the class was not entitled to damages even assuming that the AO had violated the statute.

20. On appeal, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups," the "sponsor of the 2002 law" (Senator Joseph Lieberman) and legal-technology firms—all detailing the practical harms caused by excessive PACER fees. Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times (Feb. 4, 2019), https://perma.cc/LN5E-EBE9. Prominent media outlets, like the *New York Times*, published editorials championing the lawsuit. *See Public Records Belong to the Public*, N.Y. Times (Feb. 7, 2019), https://perma.cc/76P8-WFF7. And by the end of 2019, the judiciary announced that it was doubling the quarterly fee waiver for PACER from $15 to $30, which had the effect of eliminating PACER fees for approximately 75% of PACER users. *See* Kimberly Robinson, *Judiciary Doubles Fee Waiver for PACER Access to Court Records*, Bloomberg Law (Sept. 17, 2019), https://perma.cc/CHF3-XVTT; Theresa A. Reiss, Cong. Research Serv., LSB10672, *Legislative & Judicial Developments*

Affecting Public Access to Court Electronic Records (PACER) 1 (Feb. 1, 2022), https://perma.cc/WT8K-G64X.

21. In August 2020, the Federal Circuit unanimously rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP v. United States*, 968 F.3d 1340, 1350 (Fed. Cir. 2020). It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (specifically, those that were not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was "one other potential source of liability," because the court was not able to confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The court left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

22. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. *See* Reiss, *Legislative & Judicial Developments Affecting PACER* at 1–2; Senate Judiciary Committee, *Judiciary Committee Advances Legislation to Remove PACER Paywall, Increase Accessibility to Court Records* (Dec. 9, 2021), https://perma.cc/8WBB-FTDY; Nate Raymond, *Free PACER? Bill to end fees for online court records advances in Senate*, Reuters (Dec. 9, 2021), https://perma.cc/H29N-C52M. Notes from a closed March 2022 meeting showed that "[t]he Judicial Conference of the United States [also now] supported offering free public access to the

federal court records system for noncommercial users." Craig Clough, *Federal Judiciary Policy Body Endorses Free PACER Searches*, Law360 (May 31, 2022), https://perma.cc/YP8M-Q5CK.

The Settlement Negotiations

23. On remand, the case was reassigned to Judge Paul Friedman, and the parties came together to discuss the path forward. They understood that, were the case to remain on a litigation track, there would be significant uncertainty and delay. Years of protracted litigation lay ahead, including a lengthy formal discovery process that could require the judiciary to painstakingly reconstruct line-item expenses and likely a second appeal and a trial on damages. And the range of potential outcomes was enormous: On one side, the government maintained that it owed *no* damages because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower—a litigating position that also made it difficult for the judiciary to lower fees during the pendency of the litigation. The government further maintained that, in any event, the full category of CM/ECF was properly funded with PACER fees. On the other side, the plaintiffs maintained that liability had been established, and that some portion of CM/ECF was likely improper.

24. Hoping to bridge this divide and avoid years of litigation, the parties were able to agree on certain structural aspects of a potential settlement, and they agreed to engage in mediation on the amount and details. On December 29, 2020, at the parties' request, Judge Friedman stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation.

25. Over the next few months, the parties prepared and exchanged information and substantive memoranda, with detailed supporting materials, which together provided a balanced and comprehensive view of the strengths and weaknesses of the case. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, a retired Boston University law professor and one of the nation's most experienced and accomplished mediators.

26. With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-made settlement, and the plaintiffs agreed to consider the government's final offer concerning the total amount of that fund, inclusive of all settlement costs, attorneys' fees, and service awards.

27. But by the time the session had ended, the parties still hadn't reached agreement on the total amount of the settlement or several other key terms—including how the funds would be distributed, what to do with any unclaimed funds after the initial distribution, and the scope of the release. Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed.

28. Further progress was slow, and at times the parties reached what could have been insurmountable impasses. A particular sticking point concerned the allocation of settlement funds. Consistent with the parties' starkly differing litigating positions on both liability and damages, the plaintiffs argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers—"to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note. Over a period of many months, the parties were able to resolve their differences and reach a compromise of these competing approaches: a minimum payment of $350—the smallest amount that the government would agree to—with a pro rata distribution beyond that amount.

The final version of the agreement was executed on July 27, 2022. *See* Ex. A. The parties later executed two supplemental agreements making certain technical modifications to the agreement. *See* Ex. B & C.

The Parties' Settlement

29. As clarified by the supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the class period"), excluding opt-outs, federal agencies, and class counsel. Ex. A ¶ 3 & Ex. B. This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Ex. A ¶ 4. Because this second group of people are not part of the original class, they did not receive notice or an opportunity to opt out when the original class was certified. For that reason, under the settlement, these additional class members will receive notice and an opportunity to opt out. *Id.*

30. The settlement provides for a total common-fund payment by the United States of $125 million, which covers monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11. Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust (to be called the "PACER Class Action Settlement Trust"). *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16. In exchange for their payments, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the class period. *Id.* ¶ 13. This release does not cover any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.), the only pending PACER-fee related lawsuit of which the AO is aware. Ex.

A ¶ 13. The amount of settlement funds disbursed to any class member in this case, however, will be deducted from any monetary recovery that the class member may receive in *Fisher*. *Id.*

31. Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, and with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41), the extension of which the parties will be jointly requesting from this Court. Ex. A ¶ 14. After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

32. Under the settlement, class members will not have to submit a claim or to receive their payment. *Id.* Instead, KCC has and will continue to use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.*

33. The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18. KCC will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to at least $100 million.

34. ***First distribution.*** KCC will distribute the Remaining Amount to class members like so: It will allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. *Id.* ¶ 19. KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* It will then deduct this Aggregate Minimum Payment

Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the class period. *Id.*

35. Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the class period will receive a payment equal to the total amount of PACER fees paid by that class member during the class period; and (b) each class member who paid more than $350 in PACER fees during the class period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

36. KCC will complete disbursement of each class member's share of the recovery within 90 days of receiving the $125 million from the United States, or within 21 days after receiving the necessary information from AO, whichever is later. *Id.* ¶ 21. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates, and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. *Id.* ¶ 22.

37. ***Second distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the trust one year after the $125 million payment by the United States, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. *Id.* ¶ 23. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the class period, and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After

First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the class period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. *Id.* ¶ 24. Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. *Id.* If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

38. ***Fairness hearing.*** The agreement further provides that, within 75 days of its execution—that is, by October 11, 2022—the plaintiffs will submit to the Court a motion for an order approving settlement notice to the class under Rule 23(e). *Id.* ¶ 27, Ex. B.

39. Consistent with the agreement, the plaintiffs are applying to this Court for an award of attorneys' fees and reimbursement of litigation expenses, and for service awards for the class representatives in amounts not to exceed $10,000 per representative. Ex. A ¶ 28. As noted above, these awards will be paid out of the settlement trust and will not exceed 20% of the $125 million paid by the United States. *Id.* The motion for an award of attorneys' fees and litigation expenses is subject to this Court's approval, and class members have the right to object to the motion. *Id.*

40. Within 30 days of the order approving settlement notice to the class (or within 30 days of KCC's receipt of the necessary information from the AO, if later), KCC provided notice via email to class members for whom the AO has an email address. *Id.* ¶ 29; Ex. C ¶ 2. Within 45 days of the order approving settlement notice, KCC sent postcard notice via U.S. mail to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Ex. A ¶ 29; Ex. C ¶ 5. KCC has also provided the relevant case documents on a

website it has maintained that is dedicated to the settlement (www.pacerfeesclassaction.com). Ex. A ¶ 29; Ex. C ¶ 3. The notice included an explanation of the procedures for allocating and distributing the trust funds, the date upon which the Court will hold a fairness hearing under Rule 23(e), and the date by which class members must file their written objections, if any, to the settlement. Ex. A ¶ 29. The notice sent to the additional class members—those who are not part of the class already certified by this Court—also informed them of their right to opt out and the procedures through which they may exercise that right. Ex. C ¶ 6. The opt-out period for these additional class members is 90 days. *Id.*

41. Any class member may express their views supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Ex. A ¶ 30. Counsel for the parties may respond to any objection within 21 days after receipt of the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32; Ex. C ¶ 7.

42. After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing at which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Ex. A ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.*

* * *

43. This settlement is the result of more than seven years of hard-fought litigation, including more than a year of careful negotiation by the parties. It is, in my view and the view of the three class representatives, an excellent settlement for the class. Before this case was filed, there was no historical precedent for bringing suit against the federal judiciary—*in* the federal judiciary—

based on fees charged *by* the federal judiciary. Now there is. If approved, the settlement will deliver real relief to every single class member: a full refund of up to $350 for any PACER fees that each class member paid during the class period, plus additional amounts for class members who paid more than $350 in PACER fees during that period. According to data provided by the government, this means that the vast majority of class members will receive a full refund—100 cents on the dollar—for the PACER fees that they paid during the class period.

44. And the settlement will provide this relief quickly. Whereas litigating the case to a final judgment would take years—with no guarantee of *any* recovery for class members given the government's legal position—the settlement will produce a final judgment in a matter of months. Moreover, although the settlement does not include injunctive relief, that is only because this relief is unavailable against the judiciary. After this litigation was filed, however, Congress began taking steps to eliminate PACER fees, and there is now a Federal Circuit decision that interprets (and imposes limits on) the statute authorizing fees, while making clear that PACER users have a cause of action to challenge such fees in the future. It is hard to imagine a better result for the class.

Class Counsel's Experience and Qualifications

45. Throughout the seven years of this hard-fought litigation, the plaintiffs were represented by two law firms appointed by the Court as lead class counsel: Gupta Wessler LLP and Motley Rice LLC. The firms worked together on all aspects of the litigation, with our team at Gupta Wessler taking the lead role on briefing, argument, research, and legal analysis, and Motley Rice taking a lead role in case management, discovery, and settlement administration.

46. I am the founding principal of Gupta Wessler LLP, a boutique law firm that focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. I am also a Lecturer on Law at Harvard Law School, where I teach the Harvard Supreme Court Litigation Clinic and regularly teach courses on the American civil-justice system. I am a

public member of the American Law Institute and an elected member of the Administrative Conference of the United States. Over more than two decades, I have led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and numerous state and federal courts nationwide. I have also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of my advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing. My biographical page is attached as Exhibit D.

47. My colleague Jonathan Taylor played a key role on all aspects of this litigation, from conceptualizing the case with me at the outset, to presenting oral argument on summary judgment in the district court, to putting the finishing touches on the motion for final approval. When the case was filed, Mr. Taylor was an associate at the firm; he is now a principal. Mr. Taylor is a graduate of Harvard Law School who clerked for a federal circuit judge before joining Gupta Wessler. He has presented oral argument in the majority of federal circuits and has been the principal author of dozens of briefs filed in the U.S. Supreme Court and all levels of the state and federal judiciaries. His law firm biography is attached as Exhibit E.

48. Class actions and litigation involving the federal government are a particular focus of my work and my firm's work. Mr. Taylor and I have both argued numerous appeals on class-action issues at all levels of the federal courts, and much of our firm's docket is occupied by appeals arising from class actions. Our firm also initiates select class-action cases, like this one, from the ground up—typically in collaboration with large, sophisticated class-action firms like Motley Rice.

49. By the time that Gupta Wessler and Motley Rice filed this lawsuit together, we were able to draw from a considerable body of collective experience successfully bringing class actions for monetary relief against the federal government—a relatively rare form of litigation. Among other things, my colleague Jonathan Taylor and I had successfully represented a nationwide

certified class of all of the nation's federal bankruptcy judges and their surviving spouses, estates, and beneficiaries, resulting in a judgment against the United States for $56 million in illegally withheld judicial pay and benefits. *Houser v. United States*, No. 13–607C (Fed. Cl.). While still at Public Citizen, I had successfully represented a nationwide class of veterans challenging the Army Air Force Exchange Service's withholding of federal benefits to collect old debts arising out of purchases of military uniforms, recovering $7.4 million in illegal charges. *Briggs v. Army & Air Force Exchange Service*, No. C 07–05760 (N.D. Cal.). And, together with Motley Rice, we were already representing a recently certified class of tax-return prepares in this Court, seeking the recovery of millions of dollars in unlawfully excessive fees paid to the IRS. In each one of these cases, the claims sought recovery of illegal exactions from the federal government on a class basis, with jurisdiction premised on the Tucker Act or the Little Tucker Act. *Steele v. United States*, No. 14-cv-01523-RCL (D.D.C.). This experience is further detailed below.

50. ***Bankruptcy Judges' Compensation Litigation.*** In November 2012, I was approached by the National Conference of Bankruptcy Judges about whether I would agree to represent the nation's federal bankruptcy judges in preparation for class-action litigation over salary and benefits that the United States allegedly owed to the judges and their beneficiaries. Over a number of years, Congress had violated the U.S. Constitution's Compensation Clause with respect to the salaries of federal district judges. The bankruptcy judges wanted to explore potential statutory claims, under the Tucker Act, arising from those constitutional violations. The Conference had appointed members of a litigation committee, led by Chief Bankruptcy Judge Barbara Houser of the Northern District of Texas (herself a former experienced complex litigator).

51. This committee of federal bankruptcy judges conducted a nationwide search for the counsel most qualified to represent them. They sought lawyers experienced in both litigation with the federal government and class actions, and capable of handling any appellate proceedings. After

soliciting recommendations and interviewing several firms, they chose our firm to represent them and asked me to serve as lead counsel.

52. As a result, our firm served as sole counsel to a certified nationwide class of current and former federal bankruptcy judges and their surviving spouses, life-insurance beneficiaries, and estates in *Houser v. United States*, No. 13–607C (Fed. Cl.)—one of the few certified class actions of federal judges in U.S. history. We litigated the case from start to finish, ultimately securing a judgment of approximately $56 million in November 2014 in the Court of Federal Claims, and working thereafter to administer a comprehensive claims process.

53. I served as lead class counsel in *Houser*, working closely with Jonathan Taylor. The case required us to interact on a constant basis with our counterparts at the Department of Justice. Our formal litigation work eventually included successful briefing and argument on the government's motion to dismiss, cross-motions for summary judgment on liability, a motion for class certification, and a class-notice plan. Our work did not end with the certification of a class and the court's determination of liability. To the contrary, we retained damages experts, vetted the government's damages calculations, continued to respond to class members' inquiries, and negotiated with the government over a stipulated judgment and a class-claims process that delivered our clients one hundred cents on the dollar.

54. In recognition of our successful efforts in the litigation, Mr. Taylor and I both received the President's Award from the National Conference of Bankruptcy Judges. On March 22, 2016, *The American Lawyer* reported on our role in this litigation, observing that "[i]t's hard to imagine a higher compliment than being hired to represent federal judges" in this important class-action litigation against the United States.

55. ***IRS Tax Preparer Fees Litigation.*** We currently serve as co-counsel for the plaintiffs in *Steele v. United States*, No. 14-cv-01523-RCL (D.D.C.), another case in this Court with

many similarities to this litigation. In that case, we represent a certified nationwide class of tax-return preparers suing the federal government under the Little Tucker Act for excessive user fees.

56. As in the litigation here, the plaintiffs in *Steele* bring an illegal-exaction claim against the government. A team from the national class-action firm Motley Rice LLC (co-lead in this case) serves as lead counsel in *Steele*, and brought us into the case because of our relevant expertise with litigation involving the federal government. On June 30, 2015, Judge Lamberth issued a decision appointing our team as interim class counsel in *Steele*. In his decision, he noted that he was "thoroughly impressed by the qualifications" of counsel—including previous work on "class actions against the government" and "illegal exaction claims." *Steele*, Dkt. 37, at 7. On February 9, 2016, Judge Lamberth certified a nationwide class and named us class counsel. *Steele*, Dkt. 54

57. ***Experience Defending the Federal Government in Litigation.*** Before founding Gupta Wessler in 2012, I served as Senior Litigation Counsel in the U.S. Department of the Treasury, setting up the new Consumer Financial Protection Bureau (CFPB), and then in the Office of the General Counsel at the CFPB, where I successfully defended the agency in litigation. That work included serving as lead counsel in a successful defense in this Court—against an APA and Fifth Amendment challenge—of federal regulations that established nationwide licensing and regulation of mortgage brokers for the first time. *Neighborhood Assistance Corp. of Am. v. Consumer Fin. Prot. Bureau*, 907 F. Supp. 2d 112 (D.D.C. 2012). I was also responsible for setting up the new agency's appellate litigation and amicus programs and working with the Office of the Solicitor General on cases before the U.S. Supreme Court. Finally, my duties included advising senior government officials on issues of constitutional and administrative law, including issues related to the launch of the new federal agency. *See* Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945 (2013).

58. Before my stint in government service (and following my federal judicial clerkship), I spent seven years at Public Citizen Litigation Group in Washington, DC—one of the nation's preeminent public-interest organizations. There, as a staff attorney and director of the Consumer Justice Project, I focused on litigating cutting-edge class actions and appeals nationwide. I also spent my first year at the organization as the Alan Morrison Supreme Court Fellow, working on litigation before the U.S. Supreme Court.

59. ***Veterans' Withholding Litigation.*** Much of my litigation at Public Citizen involved the federal government. In *Briggs v. Army & Air Force Exchange Service*, No. C 07–05760, 2009 WL 113387 (N.D. Cal. Jan. 16, 2009), for example, I successfully represented a nationwide class of veterans challenging the government's illegal withholding of federal benefits to collect old debts arising out of purchases of military uniforms. I took the lead in briefing and arguing several issues relevant to this litigation—including Little Tucker Act jurisdiction, and the interaction between the class-action device and the special venue rules applicable to the federal government. My co-counsel and I ultimately obtained a $7.4 million settlement for our clients.

60. I also served as lead counsel for three national consumer groups in a successful and groundbreaking APA unreasonable-delay suit against the U.S. Department of Justice, resulting in the creation and implementation of the National Motor Vehicle Title Information System. *See Pub. Citizen, et al v. Mukasey*, 2008 WL 4532540 (N.D. Cal.).

61. Finally, I served as co-counsel in a case in which we successfully represented survivors of Hurricanes Katrina and Rita in an APA and constitutional due-process challenge to FEMA's denial of federal disaster assistance. *See Ass'n of Comty. Orgs. for Reform Now v. Fed. Emergency Mgmt. Agency*, 463 F. Supp. 2d 26 (D.D.C. 2006).

Class Counsel's Hours, Lodestar, and Multiplier

62. The information in this declaration regarding the time spent on the case by Gupta Wessler LLP attorneys and other professional support staff is based on contemporaneous daily time records regularly prepared and maintained by the firm. I reviewed these time records in connection with the preparation of this declaration. The purpose of this review was to confirm both the accuracy of the time entries as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation.

63. Below is a summary lodestar chart which lists (1) the name of each timekeeper in my firm who worked on this case; (2) their title or position (e.g., principal, associate, paralegal) in the firm; (3) the total number of hours they worked on the case from its inception through and including August 28, 2023; (4) their current hourly rate; and (5) their lodestar (not including projected future work on class-action settlement administration). The chart also includes a projected $400,000 that we conservatively estimate for time that will be incurred address post-settlement issues and inquiries.

Name	Title	Total Hours	Current Rate	Total Lodestar
Deepak Gupta	Principal	1497.5	1150	$1,722,125.00
Jonathan E. Taylor	Principal	1519	975	$1,481,025.00
Rachel Bloomekatz	Principal	5.73	875	$5,013.75
Peter Romer-Friedman	Principal	3.00	875	$2,625.00
Daniel Wilf-Townsend	Associate	12.60	700	$8,820.00
Joshua Matz	Associate	6.40	700	$4,480.00
Neil Sawhney	Associate	3.30	700	$2,310.00
Robert Friedman	Associate	2.60	700	$1,820.00
Stephanie Garlock	Paralegal	27.55	350	$9,642.50

Mahek Ahmad	Paralegal	52.75	350	$18,462.50
Rana Thabata	Paralegal	24.62	350	$8,617.00
Nabila Abdallah	Paralegal	17.57	350	$6,149.50
Total Past Lodestar				$3,271,090.25
Gupta Wessler Projected Post-Settlement Lodestar				$400,000
Total Gupta Wessler Lodesar				$3,671,090.25
Total Lodestar for Both Law Firms				$6,031,678.25

64. Our firm's total lodestar is thus $3,671,090.25. As reflected in the contemporaneously filed Declaration of Meghan S.B. Oliver, Motley Rice calculates $1,860,588.00 in lodestar plus future projected lodestar of $500,000, for a total of $2,360,588. The total lodestar for both firms is thus $6,031,678.25. Because we are seeking a total fee award of $23,863,345.02—the amount equal to 20% of the $125 million common fund, minus the requested costs, expenses, and service awards—the multiplier in this case is approximately 3.956.

65. Before this case was filed, each named plaintiff signed a retainer agreement with class counsel that provided for a contingency fee of up to 33% of the common fund.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed in Washington, DC, on August 28, 2023.

/s/ Deepak Gupta
Deepak Gupta

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civ. A. No. 16-0745 (PLF)

CLASS ACTION SETTLEMENT AGREEMENT

For the purpose of disposing of the plaintiffs' claims in this case without any further judicial proceedings on the merits and without there being any trial or final judgment on any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose except as provided herein, the parties stipulate and agree as follows:

Background and Definitions

1. The plaintiffs challenge the lawfulness of fees charged by the federal government to access to records through the Public Access to Court Electronic Records program or "PACER." The lawsuit claims that the fees are set above the amount permitted by statute and seeks monetary relief under the Little Tucker Act, 28 U.S.C. § 1346(a) in the amount of the excess fees paid. The government contends that all such fees are lawful.

2. The complaint was filed on April 21, 2016. ECF No. 1. On January 24, 2017, this Court certified a nationwide class under Federal Rule of Civil Procedure ("Rule") 23(b)(3) and a single class claim alleging that PACER fees exceeded the amount authorized by statute and seeking

recovery of past overpayments. ECF Nos. 32, 33. The Court also appointed Gupta Wessler PLLC and Motley Rice LLC (collectively, "Class Counsel") as co-lead class counsel. *Id.*

3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018 ("the Class Period"). Excluded from that class are: (i) entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

4. The class originally certified by this Court consists only of individuals and entities who paid fees for use of PACER between April 21, 2010, and April 21, 2016 (with the same three exceptions noted in the previous paragraph). Plaintiffs who were not included in that original class definition—that is to say, PACER users who were not included in the original class and who paid fees for use of PACER between April 22, 2016, and May 31, 2018—shall be provided with notice of this action and an opportunity to opt out of the class.

5. On April 17, 2017, the Court entered an order approving the plaintiffs' proposed plan for providing notice to potential class members. ECF No. 44. The proposed plan designated KCC as Class Action Administrator ("Administrator"). Notice was subsequently provided to all Class Members included in the original class, and they had until July 17, 2017, to opt out of the class, as explained in the notice and consistent with the Court's order approving the notice plan. The notice referenced in paragraph 4 above shall be provided by the Administrator.

6. On March 31, 2018, the Court issued an opinion on the parties' cross-motions for summary judgment on liability. ECF No. 89; *see Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 126 (D.D.C. 2018). While briefing cross-motions on liability, the parties "reserv[ed] the damages determination for" a later point "after formal discovery." *Id.* at 138.

7. On August 13, 2018, the Court certified its March 31, 2018, summary-judgment decision for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(b). ECF Nos. 104,

105; *see Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018).

8. On August 6, 2020, the Federal Circuit affirmed this Court's decision on the parties' motions for summary judgment and remanded the case to this Court for further proceedings. *See Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1343 (Fed. Cir. 2020).

9. Following the Federal Circuit's decision, the parties agreed to engage in mediation to discuss the possibility of settling Plaintiffs' claims. On December 29, 2020, this Court stayed the proceedings through June 25, 2021, and it has repeatedly extended that stay since then as the parties have made progress on negotiating a global settlement.

10. On May 3, 2021, the parties participated in a day-long private mediation session in an attempt to resolve Plaintiffs' claims. Since then, the parties have engaged in numerous follow-up conversations via phone and email to come to an agreement on resolving the claims.

Common Fund Payment and Release

11. Plaintiffs have offered to settle this action in exchange for a common-fund payment by the United States in the total amount of one hundred and twenty-five million dollars ($125,000,000.00) (the "Aggregate Amount") inclusive of monetary relief for Plaintiffs' claims, interest, attorney fees, litigation expenses, administration costs, and any service awards to Class Representatives. Subject to this Court's approval, as set forth in paragraph 33, Plaintiffs' offer has been accepted by the United States.

12. Following the Court's order granting final approval of the settlement, as described in the "Fairness Hearing" portion of this agreement, and only after the appeal period for that order has expired, the United States shall pay the Aggregate Amount to the Administrator for deposit in the Settlement Trust, as referenced in paragraph 16.

13. Upon release of the Aggregate Amount from the U.S. Department of the Treasury's Judgment Fund, Plaintiffs and all Class Members release, waive, and abandon, as to the United States, its political subdivisions, its officers, agents, and employees, including in their official and individual capacities, any and all claims, known or unknown, that were brought or could have been brought against the United States for purported overcharges of any kind arising from their use of PACER during the Class Period. This release does not cover any claims based on PACER usage after May 31, 2018, nor any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). But the amount of settlement funds disbursed to any Class Member in this case shall be deducted in full from any monetary recovery that the Class Member may receive in *Fisher*. The Administrative Office of the U.S. Courts ("Administrative Office") represents that, apart from *Fisher*, it is aware of no other pending PACER-fee lawsuit pertaining to claims based on PACER usage on or before May 31, 2018.

Information

14. Within 30 days of a final order approving the settlement, Class Counsel shall provide to the Administrative Office the PACER account numbers of Class Counsel and all individuals who have opted out of the Class. Within 90 days of a final order approving the settlement, the Administrative Office shall make available to the Administrator the records necessary to determine the total amount owed to each Class Member, and the last known address or other contact information of each Class Member contained in its records. Should the Administrative Office need more than 90 days to do so, it will notify the Administrator and Class Counsel and provide the necessary information as quickly as reasonably possible. The Administrator shall bear sole responsibility for making payments to Class Members, using funds drawn from the Settlement Trust, as provided below. In doing so, the Administrator will use the data that the Administrative Office

currently possesses for each Class Member, and the United States shall be free of any liability based on errors in this data (*e.g.*, inaccurate account information, incorrect addresses, etc.).

15. The PACER account information provided in accordance with the previous paragraph shall be provided pursuant to the terms of the Stipulated Protective Order issued in this lawsuit on April 3, 2017 (ECF No. 41) as modified to encompass such information and shall be subject to the terms of the Stipulated Protective Order. The parties agree to jointly request that the Court extend the Stipulated Protective Order to encompass such information prior to the 90-day period set forth in the previous paragraph.

Disbursement of the Aggregate Amount

16. The Administrator shall establish a Settlement Trust, designated the "PACER Class Action Settlement Trust," to disburse the proceeds of the settlement. The administration and maintenance of the Settlement Trust, including responsibility for distributing the funds to Class Members using methods that are most likely to ensure that Class Members receive the payments, shall be the sole responsibility of the Administrator. Class Members will not be required to submit a claim form or make any attestation to receive their payments. The only obligation of the United States in connection with the disbursement of the Aggregate Amount will be: (i) to transfer the Aggregate Amount to the Administrator once the Court has issued a final order approving the settlement and the appeal period for that order has expired, and (ii) to provide the Administrator with the requisite account information for PACER users, as referenced in paragraph 14. The United States makes no warranties, representations, or guarantees concerning any disbursements that the Administrator makes from the Settlement Trust, or fails to make, to any Class Member. If any Class Member has any disagreement concerning any disbursement, the Class Member shall resolve any such concern with the Administrator.

17. The Settlement Trust is intended to be an interest-bearing Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1. The Administrator shall be solely responsible for filing all informational and other tax returns as may be necessary. The Administrator shall also be responsible for causing payments to be made from the Settlement Trust for any taxes owed with respect to the funds held by the Settlement Trust. The Administrator shall timely make all such elections and take such other actions as are necessary or advisable to carry out this paragraph.

18. As approved by the Court, the Administrator shall disburse the proceeds of the settlement as follows: The Administrator shall retain from the Settlement Trust all notice and administration costs actually and reasonably incurred, which includes actual costs of publication, printing, and mailing the notice, as well as the administrative expenses actually incurred and fees reasonably charged by the Administrator in connection with providing notice and processing the submitted claims. The Administrator shall distribute any service awards approved by the Court to the named plaintiffs, and any attorney fees and costs approved by the Court to Class Counsel, as set forth in the "Fairness Hearing" portion of this agreement. After the amounts for attorney fees, expenses, service awards, and notice and administration costs have been paid from the Aggregate Amount, the remaining funds shall be distributed to the class ("Remaining Amount"). The Remaining Amount shall be no less than 80% of the Aggregate Amount, or $100,000,000.

19. ***First Distribution.*** The Administrator shall allocate the Remaining Amount among Class Members as follows: First, the Administrator shall allocate to each Class Member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that Class Member for use of PACER during the Class Period. Second, the Administrator shall add together each minimum payment amount for each Class Member, which will produce the Aggregate Minimum Payment Amount. Third, the Administrator shall then deduct the Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata (based on the

amount of PACER fees paid in excess of $350 during the Class Period) to all Class Members who paid more than $350 in PACER fees during the Class Period.

20. Thus, under the formula for the initial allocation: (a) each Class Member who paid a total amount less than or equal to $350 in PACER fees for use of PACER during the Class Period would receive a payment equal to the total amount of PACER fees paid by that Class Member for PACER use during the Class Period; and (b) each Class Member who paid more than $350 in PACER fees for use of PACER during the Class Period would receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount.

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 90 days of receipt of the Aggregate amount, or within 21 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

22. The Administrator shall keep an accounting of the disbursements made to Class Members, including the amounts, dates, and outcomes (*e.g.*, deposited, returned, or unknown) for each Class Member, and shall make all reasonable efforts, in coordination with Class Counsel, to contact Class Members who do not deposit their payments within 90 days of the payment being made to them.

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust one year after the United States has made the payment set forth in paragraph 12, those funds ("the Remaining Amount After First Distribution") shall be distributed to

Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed following one year after the United States has made the payment set forth in paragraph 12 shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel

One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

24. Class Members who are eligible to receive a second distribution shall have three months from the time of the distribution to deposit or otherwise collect their payments. If, after this three-month period expires, unclaimed or undistributed funds remain in the Settlement Trust, those funds shall revert unconditionally to the U.S. Department of the Treasury. Upon expiration of this three month period, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the addresses referenced in paragraph 23 of this reverter. Instructions to effectuate the reverter will be provided to the Administrator following receipt of such notice, and the Administrator agrees to promptly comply with those instructions. The three-month period will run for all Class Members eligible to receive a second distribution from the date the earliest distribution is made of a second distribution to any Class Member eligible for such a distribution. Upon request, the Administrator will notify the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office of the date the three-month period commenced. To the extent a payment in connection with the Second Distribution is made to a Class Member by the Administrator by check, any check that remains uncashed following this three-month period shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for reverter to the United States.

25. The Class Representatives have agreed to a distribution structure that may result in a reverter to the U.S. Treasury for purposes of this settlement only.

26. Neither the parties nor their counsel shall be liable for any act or omission of the Administrator or for any mis-payments, overpayments, or underpayments of the Settlement Trust by the Administrator.

Fairness Hearing

27. As soon as possible and in no event later than 60 days after the execution of this agreement, Class Counsel shall submit to the Court a motion for an Order Approving Settlement Notice to the Class under Rule 23(e). The motion shall include (a) a copy of this settlement agreement, (b) the proposed form of the order, (c) the proposed form of notice of the settlement to be mailed to Class Members and posted on an internet website dedicated to this settlement by the Administrator, and (d) the proposed form of notice to be mailed to Class Members who were not included in the original class definition certified by the Court on January 24, 2017, as discussed in paragraph 4, and posted on the same website, advising them of their right to opt out. The parties shall request that a decision on the motion be made promptly on the papers or that a hearing on the motion be held at the earliest date available to the Court.

28. Under Rule 54(d)(2), and subject to the provisions of Rule 23(h), Plaintiffs will apply to the Court for an award of attorney fees and reimbursement of litigation expenses, and for service awards for the three Class Representatives in amounts not to exceed $10,000 per representative. These awards shall be paid out of the Aggregate Amount. When combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable. The United States reserves its right, upon submission of Class Counsel's applications, to advocate before the Court for the use of a lodestar cross-check in determining the fee award, and for a lower service award for the Class Representatives should Plaintiffs seek more than $1,000 per representative. Plaintiffs' motion for an award of attorney fees and litigation expenses shall be subject to the approval of the Court and notice of the motion shall be provided to Class Members informing them of the request and their right to object to the motion, as required by Rule 23(h).

29. Within 30 days of the Court's entry of the Order Approving Settlement Notice to the Class, the Administrator shall mail or cause to be mailed the Notice of Class Action Settlement by email or first-class mail to all Class Members. Contemporaneous with the mailing of the notice and continuing through the date of the Fairness Hearing, the Administrator shall also display on an internet website dedicated to the settlement the relevant case documents, including the settlement notice, settlement agreement, and order approving the notice. The Notice of Class Action Settlement shall include an explanation of the procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" under Rule 23(e), and the date by which Class Members must file their written objections, if any, to the settlement.

30. Any Class Member may express to the Court his or her views in support of, or in opposition to, the fairness, reasonableness, and adequacy of the proposed settlement. If a Class Member objects to the settlement, such objection will be considered only if received no later than the deadline to file objections established by the Court in the Order Approving Settlement Notice to the Class. The objection shall be filed with the Court, with copies provided to Class Counsel and counsel for the United States, and the objection must include a signed, sworn statement that (a) identifies the case number, (b) describes the basis for the objection, including citations to legal authority and evidence supporting the objection, (c) contains the objector's name, address, and telephone number, and if represented by counsel, the name, address, email address, and telephone number of counsel, and (d) indicates whether objector intends to appear at the Fairness Hearing.

31. Class Counsel and counsel for the United States may respond to any objection within 21 days after receipt of the objection.

32. Any Class Member who submits a timely objection to the proposed settlement may appear in person or through counsel at the Fairness Hearing and be heard to the extent allowed by the Court. Any Class Members who do not make and serve written objections in the manner

provided in paragraph 30 shall be deemed to have waived such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

33. After the deadlines for filing objections and responses to objections have lapsed, the Court will hold the Fairness Hearing at which it will consider any timely and properly submitted objections made by Class Members to the proposed settlement. The Court will decide whether to approve the settlement and enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. The parties shall request that the Court schedule the Fairness Hearing no later than 150 days after entry of the Court's Order Approving Settlement Notice to the Class.

34. If this settlement is not approved in its entirety, it shall be void and have no force or effect.

Miscellaneous Terms

35. This agreement is for the purpose of settling Plaintiffs' claims in this action without the need for further litigation, and for no other purpose, and shall neither constitute nor be interpreted as an admission of liability on the part of the United States.

36. Each party fully participated in the drafting of this settlement agreement, and thus no clause shall be construed against any party for that reason in any subsequent dispute.

37. In the event that a party believes that the other party has failed to perform an obligation required by this settlement agreement or has violated the terms of the settlement agreement, the party who believes that such a failure has occurred must so notify the other party in writing and afford it 45 days to cure the breach before initiating any legal action to enforce the settlement agreement or any of its provisions.

38. The Court shall retain jurisdiction for the purpose of enforcing the terms of this settlement agreement.

39. Plaintiffs' counsel represent that they have been and are authorized to enter into this agreement on behalf of Plaintiffs and the class.

40. Undersigned defense counsel represents that he has been authorized to enter into this agreement by those within the Department of Justice with appropriate settlement authority to authorize the execution of this agreement.

41. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

<REMAINDER OF PAGE LEFT BLANK; SIGNATURES PAGES TO FOLLOW>

AGREED TO ON BEHALF OF PLAINTIFFS:

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
Meghan S.B. Oliver (D.C. Bar No. 493416)
Elizabeth Smith (D.C. Bar No. 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 1001
Washington, DC 20004
(202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: 07/27/2022

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: 7-12-22

JEREMY S. SIMON, D.C. BAR #447956 Dated
Assistant United States Attorney
601 D. Street, NW
Washington, DC 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 16-0745 (PLF)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION AND FIRST AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 3 of the Agreement shall be replaced with the following language:

> 3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period") regardless of when such persons or entities used the PACER system. Excluded from that class are: (i) persons or entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

In addition, the parties agree that the phrases "who paid PACER fees between [date x] and [date y]" and "who paid fees for use of PACER between [date x] and [date y]," as used in paragraphs 3 and 4 of the Agreement, refer to the payment of PACER fees in the specified period rather than the use of PACER in the specified period. The parties further agree that each specified period in those paragraphs includes both the start and end dates unless otherwise specified.

Finally, in paragraph 27 of the Agreement, the parties agree that the reference to "60 days" shall be changed to "75 days."

The remainder of Agreement remains unchanged by this Stipulation and Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MEGHAN S. B. OLIVER (D.C Bar No. 493416)
ELIZABETH SMITH (D.C. Bar No 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 630
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: September 29, 2022

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 9-29-22

JEREMY S. SIMON, D.C. Bar No. 447956 Dated
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-0745 (PLF)

STIPULATION AND SECOND AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Second Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 21 of the Agreement shall be replaced with the following language:

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 180 days of receipt of the Aggregate amount, or within 180 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

Paragraph 23 of the Agreement shall be replaced with the following language:

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust 180 days after the Administrator has made the distribution described in paragraph 21, those funds ("the Remaining Amount After

First Distribution") shall be distributed to Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed 180 days after the Administrator has made the distribution described in paragraph 21, shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel
One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

The remainder of Agreement remains unchanged by this Stipulation and Second Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

____

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 N
Washington, DC 20006
Phone: (202) 888-1741 / Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MEGHAN S. B. OLIVER (D.C Bar No. 493416)
ELIZABETH SMITH (D.C. Bar No 994263)
MOTLEY RICE LLC
401 9th Street, NW, Suite 630
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com, moliver@motleyrice.com

Attorneys for Plaintiffs

Date: 04-12-23

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: __________________________________ 4-11-23
Dated

DEREK S. HAMMOND, D.C. Bar No. 1017784
Assistant United States Attorney
601 D Street, NW
Washington, D.C. 20530
(202) 252-2511
Derek.Hammond@usdoj.gov

Attorneys for the United States of America

EXHIBIT D

Gupta | Wessler

DEEPAK GUPTA

deepak@guptawessler.com

202.888.1741 | 2001 K Street, NW, Suite 850 North, Washington, DC 20006

Legal Assistant: Mahek Ahmad, mahek@guptawessler.com

Deepak Gupta is the founding principal of Gupta Wessler, where his practice focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. He is also a Lecturer at Harvard Law School, where he teaches the Harvard Supreme Court Litigation Clinic and seminars on forced arbitration, the civil justice system, and public interest entrepreneurship.

Over more than two decades, Deepak has led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and state supreme courts from Alaska to West Virginia. He has also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of Deepak's advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing. His varied clients have included national nonprofits, labor unions, state and local governments, public officials ranging from federal judges to members of Congress, professional athletes, distinguished artists and scientists, and people from all walks of life.

Case 1:16-cv-00745-PLF Document 215-5 Filed 08/25/23 Page 2 of 63

Deepak is "known as a skilled appellate lawyer" (*New York Times*) and "an all-star progressive Supreme Court litigator" (*Washington Post*) and has been described as "one of the emerging giants of the appellate and the Supreme Court bar," a "heavy hitter," a "principled" and "incredibly talented lawyer" (*Law 360*), and a "progressive legal rock star." *(New York Law Journal). Chambers USA* cites his "impressive" and "highly rated appellate practice," describing him as "an incredible oral advocate" who "writes terrific briefs" and maintains a "vibrant appellate practice focused on public interest cases and plaintiff-side representations." Deepak is consistently ranked as one of the "Best Lawyers" for Supreme Court cases by *Washingtonian* magazine; he is the only non-corporate lawyer on that list. Fastcase has honored Deepak as "one of the country's top litigators," noting that "what sets him apart" is his legal creativity. The *National Law Journal* has singled out Deepak's "calm, comfortable manner that conveys confidence" in oral argument. And *Empirical SCOTUS* cited one of Deepak's briefs as the single most readable in a recent U.S. Supreme Court term.

Deepak's Supreme Court and appellate advocacy has been recognized with several national awards, including the 2022 Appellate Advocacy Award from the National Civil Justice Institute, which "recognizes excellence in appellate advocacy in America," the Steven J. Sharpe Award for Public Service from the American Association for Justice, and the President's Award from the National Conference of Bankruptcy Judges.

Deepak is a veteran advocate before the U.S. Supreme Court, where he has filed over one hundred briefs and regularly presents oral argument. Highlights include:

- Deepak recently argued and won a landmark victory for access to justice in *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021), in which the Supreme Court ruled that people injured by mass-market products can establish personal jurisdiction to sue out-of-state corporations where their injury occurred, bucking a trend of jurisdiction-limiting decisions stretching back four decades.

- In *Smith v. Berryhill,* 139 S.Ct. 1285 (2019), Deepak argued at the Court's invitation in support of a judgment left undefended by the Solicitor General. He is the first Asian-American to be appointed by the U.S. Supreme Court to argue a case.

- In 2017, Deepak's firm was counsel for parties in three argued merits cases before the Court; he was lead counsel in two, prevailing in both. In *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144 (2017), he successfully argued a First Amendment challenge to a law designed to keep consumers in the dark about the cost of credit cards. And in *Hernández v. Mesa*, 137 S.Ct. 2003 (2017), he represented the family of a Mexican teenager killed in a cross-border shooting by a border patrol agent, successfully obtaining reversal of the Fifth Circuit's 15-0 en banc ruling that the officer was entitled to qualified immunity.

- Deepak argued *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), a watershed case on corporations' use of forced arbitration to prevent consumers and workers from banding together to seek justice.

As an appellate advocate, Deepak is frequently sought out by trial lawyers to defend their most consequential victories or resurrect worthy claims on appeal—often after years of hard-fought litigation. He is currently defending several nine-figure and eight-figure verdicts on appeal, including $275-million and $185-million verdicts against Monsanto (over toxic chemical exposure), and a $200-million verdict against UnitedHealth (over insurance bad faith). He also serves as outside counsel to the American Association for Justice.

In addition to his appellate advocacy, Deepak designs and prosecutes class actions and other legal challenges from the ground up. Highlights include:

- In *National Veterans Legal Services Program v. United States*, Deepak is lead counsel in a nationwide class action in which he persuaded the Federal Circuit that the federal judiciary has been charging people millions of dollars in unlawful fees for online access to court records. The case recently culminated in a $125 million settlement that reimburses the majority of PACER users by 100 cents on the dollar.

- In another one-of-a-kind class action, Deepak represented all of the nation's bankruptcy judges, recovering $56 million in back pay for Congress's violation of the Judicial Compensation Clause. *The American Lawyer* observed: "it's

hard to imagine a higher compliment than being hired to represent federal judges."

Deepak also frequently leads high-stakes administrative and constitutional cases involving the federal government. In recent years, he has:

- persuaded the D.C. Circuit to issue a rare emergency injunction halting an attempted government takeover of the Open Technology Fund, an internet-freedom nonprofit;
- represented environmental groups in a successful procedural challenge to a midnight rule that would have crippled the ability of the incoming EPA leadership to rely on science in setting public-health standards;
- obtained a ruling striking down the Trump Administration's decision to halt IRS collection of nonprofit donor information by dark-money groups;
- established that the Acting Director of the Bureau of Land Management had been serving unlawfully for 424 days; and
- persuaded the Second Circuit, in *Citizens for Responsibility and Ethics v. Trump*, that President Trump's competitors in the hotel and restaurant industry had standing to sue him for accepting payments in violation of the Constitution's Emoluments Clauses.

Before founding his law firm in 2012, Deepak was Senior Counsel for Litigation and Senior Counsel for Enforcement Strategy at the newly created Consumer Financial Protection Bureau. As the first appellate litigator hired under Elizabeth Warren's leadership, he launched the new agency's amicus program, defended its regulations, and worked with the Solicitor General's office on Supreme Court cases.

For seven years previously, Deepak was an attorney at Public Citizen Litigation Group, where he founded and directed the Consumer Justice Project and was the Alan Morrison Supreme Court Assistance Project Fellow. Before that, Deepak worked on voting rights at the Civil Rights Division of the U.S. Department of Justice; prisoners' rights at the ACLU's National Prison Project; and religious freedom at Americans United for Separation of Church and State. He clerked for Judge Lawrence K. Karlton of the

U.S. District Court for the Eastern District of California and studied law at Georgetown, Sanskrit at Oxford, and philosophy at Fordham.

Deepak is a member of the American Law Institute and the Administrative Conference of the United States. He sits on the boards of the National Consumer Law Center, the Alliance for Justice, the Open Markets Institute, the Lawyers' Committee for Civil Rights Under Law, the People's Parity Project, the Civil Justice Research Initiative at UC Berkeley, the Biden Institute, and the Institute for Consumer Antitrust Studies. He is a judge of the American Constitution Society's Annual Richard D. Cudahy Writing Competition on Regulatory and Administrative Law.

Deepak's publications include *Arbitration as Wealth Transfer*, 5 Yale L. & Pol'y Rev. 499 (2017) (with Lina Khan), *Leveling the Playing Field on Appeal: The Case for a Plaintiff-Side Appellate Bar*, 54 Duq. L. Rev. 383 (2016), and *The Consumer Protection Bureau and the Constitution*, 65 Admin L. Rev. 945 (2013), as well as shorter pieces for *The New York Times*, SCOTUSblog, and *Trial* magazine. He has appeared in broadcast and print media including CNN, MSNBC, FOX News, ABC's *World News* and *Good Morning America*, NPR's *All Things Considered* and *Marketplace*, and *The New York Times*, *Washington Post*, *Los Angeles Times*, *Wall Street Journal*, and *USA Today*.

Copyright © 2023 Gupta Wessler LLP

Powered by WordPress and Origin

EXHIBIT E

Gupta | Wessler

JONATHAN E. TAYLOR

jon@guptawessler.com

202.888.1741 | 2001 K Street, NW, Suite 850 North, Washington, DC 20006

Twitter: @jontaylor1 | Legal Assistant: Abbe Murphy, abbe@guptawessler.com

Jonathan E. Taylor is a principal at Gupta Wessler, where he represents plaintiffs and public-interest clients in Supreme Court, appellate, and constitutional litigation.

Since joining the firm a few months after it was founded in 2012, Jon has presented oral argument in the majority of federal circuits and has been the principal author of dozens of briefs filed in the U.S. Supreme Court and all levels of the state and federal judiciaries.

In 2021, Jon served as counsel of record in the U.S. Supreme Court in *Lombardo v. City of St. Louis*, in which he successfully obtained an unheard-of opinion summarily vacating a pro-officer decision on the merits of a police-excessive-force case. Jon was awarded the 2021 National Law Journal Rising Star award for his stellar appellate advocacy.

Among Jon's recent arguments are a Ninth Circuit appeal defending a $102 million class-action judgment against Walmart for violations of California labor law; a D.C. Circuit appeal for a certified class of tax-return preparers challenging the legality of

over $250 million in IRS-imposed fees; Third and Seventh Circuit appeals resulting in landmark decisions expanding the availability of paid-military leave; a summary-judgment hearing for a nationwide class of PACER users challenging the judiciary's fee structure for accessing court filings; a First Circuit appeal successfully defending Boston and Brookline's public-carry restrictions against a Second Amendment challenge; an Eighth Circuit appeal upholding a punitive-damages award against a constitutional attack; an Eighth Circuit appeal successfully reinstating a a jury's finding of negligence by GM in the design of a seat-belt system, and ordering a new trial on damages only; and an Eighth Circuit appeal successfully defeating a claim of immunity in a constitutional challenge to a city's "pay-to-play" system, in which people arrested for minor infractions are jailed if they can't afford to pay fees.

As these cases illustrate, Jon's work has spanned a wide range of topics—including the First Amendment, Second Amendment, Fourth Amendment, due process, Article III standing, personal jurisdiction, class certification, civil rights, administrative law, and a broad array of issues involving consumers' and workers' rights. He has represented classes of consumers and workers, tort victims, federal judges, members of Congress, national nonprofits, military reservists, former NFL players, retail merchants, and the families of people killed by police violence. Jon was also part of the litigation team that sued Donald Trump for violating the Constitution's Emoluments Claims.

Jon is from St. Louis, Missouri, and is a *cum laude* graduate of Harvard Law School. He joined the firm following his clerkship with Judge Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. In 2014, Jon received the President's Award from the National Conference of Bankruptcy Judges for his work helping to obtain a $56 million judgment on behalf of a nationwide class of federal bankruptcy judges.

Jon's experience at the firm includes the following significant matters:

- Jon presented oral argument in the Eighth Circuit and prepared the firm's successful briefing in *Bavlsik v. General Motors*, an appeal from a district court order vacating a jury's finding of negligence by General Motors in the design of a seat-belt system, following a rollover collision that left the plaintiff quadriplegic. After obtaining reversal in the Eighth

Circuit—which reinstated the jury's negligence finding and ordered a new trial on damages only—Jon served as counsel of record for the firm's brief in opposition in the U.S. Supreme Court, defeating GM's petition for certiorari. Brief in Opposition | Eighth Circuit Opinion | Eighth Circuit Opening Brief | Reply Brief | Oral Argument Audio

- Jon presented oral argument in the D.C. Circuit on behalf of a certified class of tax-return preparers challenging the legality of fees imposed by the IRS. The district court invalidated the fees—which total more than $250 million—as unauthorized. The case is *Montrois v. United States*, and the firm represents the class along with co-counsel from Motley Rice. D.C. Circuit Brief | Oral Argument Audio | Opinion Granting Summary Judgment | Motion for Summary Judgment | Opinion Granting Motion for Reconsideration | Motion for Reconsideration | Class Certification Opinion | Motion for Class Certification | Amended Complaint

- Jon presented oral argument in the First Circuit on behalf of the Town of Brookline, Massachusetts, successfully defending against a Second Amendment challenge to its restrictions on the public carry of firearms. He was also a principal author of the firm's appellate brief, which argues that the restrictions are constitutional because they rest on a seven-century Anglo-American tradition of public-carry regulations. First Circuit Brief

- Jon presented argument and was a principal author of the firm's briefing in *National Veterans Legal Services Program v. United States* (District Court for the District of Columbia), a certified nationwide class action challenging the federal judiciary's PACER fee structure as excessive. In March 2018, the court had a three-hour summary-judgment hearing in which Jon presented argument for the class. Shortly after the hearing, the court held that the judiciary had misused PACER fees during the class period, exceeding the scope of its statutory authorization to charge fees "only to the extent necessary" to recoup the costs of providing records through PACER. Our firm has been appointed class counsel in the case, along with co-counsel from Motley Rice. The lead plaintiffs are three nonprofit legal organizations (National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice). Summary-Judgment Opinion | Motion for Summary Judgment | Reply in Support

of Motion for Summary Judgment | Opinion Certifying Class | Class-Certification Motion | Class-Certification Reply | Opinion Denying Motion to Dismiss | Opposition to Motion to Dismiss | Complaint

- Jon played a lead role in *Houser v. United States* (U.S. Court of Federal Claims), in which the firm represented a class of current and former federal bankruptcy judges and their beneficiaries in a suit against the federal government under the Constitution's Judicial Compensation Clause. His work helped obtain class certification and a $56 million judgment on behalf of his clients. Jon also took the lead in coordinating the administration of the class claims process with the Department of Justice. The National Conference of Bankruptcy Judges presented Jon with its President's Award for his work on the case. Summary Judgment Brief | Complaint

- Jon presented oral argument in the Eighth Circuit and prepared the firm's appellate brief in *Webb v. City of Maplewood*, concerning a constitutional challenge to a Missouri city's "pay-to-play" system, in which people arrested for minor municipal infractions are placed in jail if they can't afford to pay fees. Along with co-counsel from ArchCity Defenders and Tycko & Zavareei, the firm successfully defeated the city's claim to immunity in an interlocutory appeal to the Eighth Circuit. Eighth Circuit Opinion | Eighth Circuit Brief | Oral Argument Audio

- Jon has been a principal brief writer in all of the firm's First Amendment challenges to state credit-card surcharge laws brought in the wake of a $7 billion swipe-fee antitrust settlement with the major credit-card companies, including the firm's successful briefing in the U.S. Supreme Court in *Expressions Hair Design v. Schneiderman*. Jon's work helped obtain victories in California, Florida, and New York, where courts struck down the laws as unconstitutional. The cases are *Expressions Hair Design* (U.S. Supreme Court, Second Circuit), *Dana's Railroad Supply v. Bondi* (Eleventh Circuit), *Rowell v. Pettijohn* (Fifth Circuit), and *Italian Colors v. Harris* (Ninth Circuit). Petitioners' Brief (Expressions) | Petitioners' Reply (Expressions) | Supreme Court Opinion | Petition for Certiorari (Expressions)| Petition for Certiorari (Rowell) | Second Circuit Brief | Eleventh Circuit Brief | Eleventh Circuit Reply | Eleventh Circuit Opinion | Fifth

Circuit Brief | Fifth Circuit Reply | Ninth Circuit Brief | Ninth Circuit Opinion | More Filings in These Matters

- Jon was one of the lead authors of the firm's briefing in the U.S. Supreme Court in *Hernández v. United States*, a case arising out of a close-range, cross-border shooting of an unarmed Mexican teenager by a U.S. border patrol agent standing on U.S. soil. After granting the firm's petition, a unanimous Supreme Court reversed the en banc Fifth Circuit's 15-0 holding that the border guard was entitled to qualified immunity. Supreme Court Opinion | Petitioners' Brief | Petitioners' Reply | Petition for Certiorari | Reply Brief | Supplemental Brief

- Jon is part of the litigation team that has sued Donald Trump in two cases for violating the Constitution's Foreign and Domestic Emoluments Clauses. The first case, brought on behalf of businesses who compete with Trump for governmental patrons, is *Citizens for Responsibility and Ethics in Washington v. Trump* and is currently on appeal to the Second Circuit. The second case, brought on behalf of Maryland and the District of Columbia, is *District of Columbia v. Trump* and is currently proceeding in the District of Maryland, where the district court has denied Trump's motion to dismiss for lack of standing and held that the case is justiciable. Second Circuit Brief | Opinion on Justiciability (Maryland) | Opposition to Motion to Dismiss (Maryland) | More Filings in These Matters

- Jon played a leading role in the firm's briefing in *Chevron v. Donziger* (Second Circuit), a RICO action brought by Chevron in an effort to avoid paying an $8.6 billion Ecuadorian judgment holding the company accountable for decades of pollution of the Amazon rainforest. Petition for Certiorari | Petition for Rehearing | Opening brief | Reply Brief | Post-Argument Letter Brief | Motion for Judicial Notice | Motion to Dismiss for Lack of Subject Matter Jurisdiction | Reply in Support of Motion to Dismiss | More Filings in This Matter

- Jon played a key role in the firm's representation of 34 former NFL players currently challenging the proposed global settlement of all claims against the NFL related to brain injuries caused by professional football. He was a primary author of the firm's petition for certiorari in the U.S. Supreme

Court. The case is *In re National Football League Players Concussion Injury Litigation* (U.S. Supreme Court, Third Circuit). Petition for Certiorari | Petitioners' Reply Brief | Third Circuit Opening Brief | Third Circuit Reply Brief

- Jon has written *amicus* briefs on behalf of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, in more than half a dozen Second Amendment cases threatening common-sense gun laws, including *Peruta v. San Diego County*, in which the en banc Ninth Circuit adopted the firm's historical analysis, as well as *Wrenn v. District of Columbia* (D.C. Circuit), *Grace v. District of Columbia* (D.C. Circuit), *Kolbe v. Hogan* (en banc Fourth Circuit), *Silvester v. Harris* (Ninth Circuit), *Peña v. Lindley* (Ninth Circuit), and *Norman v. Florida* (Florida Supreme Court). The briefs in these cases oppose challenges to public-carry regulations in California and the District of Columbia, as well as Maryland's assault-weapons ban and California's 10-day waiting period and "microstamping" law. Peruta Amicus Brief | Peruta En Banc Opinion | Grace Amicus Brief | Wrenn Amicus Brief | Kolbe Amicus Brief (en banc) | Kolbe Amicus Brief (petition stage) | Kolbe En Banc Opinion | Silvester Amicus Brief | Silvester Opinion | Peña Amicus Brief | Norman Opinion

- Jon has written two U.S. Supreme Court *amicus* briefs on behalf of the co-sponsors of the Fair Housing Act of 1968 and other current and former Members of Congress, explaining why Congress intended the Act to permit disparate-impact liability. His work was quoted in a New Yorker article discussing the issue. In June 2015, the Supreme Court issued a surprise opinion upholding disparate-impact liability, in which Justice Kennedy adopted the firm's historical analysis. Texas Department of Housing Amicus Brief | Mount Holly Amicus Brief | U.S. Supreme Court Opinion in Texas Department of Housing

- Jon played a key role in the firm's high-profile petition for en banc review in *Carrera v. Bayer* (Third Circuit), a controversial class-action case about the ascertainability requirement. Jon's efforts helped persuade four judges to dissent from the denial of en banc review and to call on the Federal Rules Committee to examine the issue. Jon has continued to focus on ascertainability issues since *Carrera*, most recently successfully opposing a petition filed by former

Solicitor General Paul Clement in *Soutter v. Equifax* (Fourth Circuit). Carrera Petition | Soutter Answer to Interlocutory Appeal Petition

- Jon has been the lead author of briefs filed in a number of important appeals concerning workers' and consumers' rights, including *Alaska Trustee v. Ambridge* (Supreme Court of Alaska), in which he successfully obtained a ruling that the Fair Debt Collection Practices Act covers foreclosures, and *Mais v. Gulf Coast Collection Bureau* (Eleventh Circuit), concerning the meaning of the Telephone Consumer Protection Act's "prior express consent" requirement. He presented oral argument in both cases. He also presented argument before the Ninth Circuit in *Koby v. ARS National Services*, in which he argued a novel question of class-action jurisdiction, successfully objecting to a nationwide class-action settlement that sought to extinguish millions of claims in exchange for nothing. Ambridge Brief | Alaska Supreme Court Opinion in Ambridge | Oral Argument Video in Ambridge | Mais Brief | Mais Answer to Interlocutory Appeal Petition | Objector's Brief in Koby | Objector's Reply Brief in Koby | Ninth Circuit Opinion in Koby | Oral Argument Video in Koby

- Jon was also a principal drafter in several other cases concerning workers' and consumers' rights, such as *Brady v. Deloitte & Touche* (Ninth Circuit), an appeal from decertification of a class of unlicensed audit employees at Deloitte & Touche who allege overtime violations; *Kingery v. Quicken Loans* (Fourth Circuit), an appeal addressing what it means for a credit-reporting agency to "use" a credit score for purposes of the Fair Credit Reporting Act; *Cole v. CRST* (Ninth Circuit), a petition involving the application of the Supreme Court's *Tyson Foods* decision to California wage-and-hour class actions; and *Dreher v. Experian* (Fourth Circuit), in which Jon twice helped defeat petitions for interlocutory review raising questions of Article III standing, class certification is statutory-damages cases, and application of the Supreme Court's decision in *Safeco v. Burr*. Brady Reply Brief (other briefing in this case filed under seal) | Cole Rule 23(f) Petition | Kingery Opening Brief | Kingery Reply Brief | Dreher Answer to Rule 23(f) Petition | Dreher Answer to § 1292(b) Petition

- Jon was the primary draftsman of the firm's brief opposing certiorari in *American Express v. Italian Colors* (U.S. Supreme Court), a major antitrust case asking whether courts must enforce arbitration even when doing so would preclude the plaintiffs from vindicating their federal statutory rights. Jon also assisted the firm's co-counsel, former Solicitor General Paul Clement, in writing the merits brief and helped coordinate amicus briefs in support of the respondents filed by the United States, 22 States, and various scholars, trade groups, and public-interest organizations. Brief in Opposition

- Jon was a primary drafter of *amicus* briefs filed on behalf of leading nonprofit organizations in two important Supreme Court cases. The first is *Tyson Foods v. Bouaphakeo*, in which the Supreme Court adopted the firm's argument for why the Court should not decertify a class of workers at a slaughterhouse seeking overtime compensation improperly denied to them. The second is *Sheriff v. Gillie*, in which the firm represents three consumer-advocacy groups supporting a challenge to debt-collecting law firms' misleading practice of using Attorney General letterhead to collect debts owed to the state constituted clear violations of the Fair Debt Collection Practices Act. Brief of Nonprofit Organizations in Tyson | U.S. Supreme Court Opinion in Tyson | Brief of Consumer-Advocacy Groups in Gillie

- Jon wrote an *amicus* brief on behalf of former Congressman Patrick Kennedy, the author and lead sponsor of the Mental Health Parity and Addiction Equity Act, in an important test case concerning the Act's scope, in which the Second Circuit held that the Act applies to claims administrators. The case is called *New York State Psychiatric Association v. UnitedHealth* (Second Circuit). Amicus Brief of Former Congressman Kennedy | Second Circuit Opinion

- Jon helped draft the firm's merits briefing in *McBurney v. Young* (U.S. Supreme Court), a constitutional challenge under the Privileges and Immunities Clause and dormant Commerce Clause to a provision of the Virginia Freedom of Information Act denying non-residents the same right of access to public records that Virginia affords its own citizens. Merits Brief for Petitioners | Merits Reply for Petitioners

Before his judicial clerkship, Jon spent a year at Public Citizen Litigation Group on a Redstone Fellowship from Harvard. While there, Jon worked with Deepak Gupta to prepare for his Supreme Court argument in *AT&T Mobility v. Concepcion*, served as principal author of a Supreme Court amicus brief concerning the False Claims Act, wrote a Ninth Circuit brief in a consumer case, and helped advise a public-health nonprofit on federal preemption of food-labeling laws. Jon also worked as an intern at Public Citizen during law school, where he worked with Deepak Gupta and Brian Wolfman on their successful Supreme Court merits brief in *Mohawk Industries v. Carpenter* and assisted with the brief filed on behalf of Senators John McCain and Russell Feingold in *Citizens United v. Federal Election Commission*.

Jon has previously worked on microfinance and antipoverty issues in Ethiopia, studied Spanish in Chile, and helped prepare a Medicaid fraud case against drug companies as an intern in the Missouri Attorney General's Office. During law school, he helped teach legal writing as a member of the Board of Student Advisers, competed in the Upper-Level Ames Moot Court Competition, and had the Best Appellee Brief in his first-year legal writing section. Jon received his undergraduate degree, *magna cum laude*, from the University of Southern California, where he was elected to Phi Beta Kappa, was awarded a Presidential Scholarship, and was a National Merit Scholar. He is a member of the bar of the District of Columbia and the Supreme Court of the United States.

Copyright © 2023 Gupta Wessler LLP

Powered by WordPress and Origin

(783 of 1275)

Case: 24-1757 Document: 32-2 Page: 332 Filed: 12/06/2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 1:16-cv-00745-PLF

DECLARATION OF MEGHAN S.B. OLIVER

I, Meghan S.B. Oliver, declare as follows:

1. I am a member of the law firm of Motley Rice LLC ("Motley Rice"). I submit this declaration in support of Class Counsel's application for an award of attorneys' fees in connection with services rendered in the above-captioned class action, as well as for reimbursement of expenses incurred by my firm in connection with the action. I have personal knowledge of the matters set forth herein, based upon my active participation in all pertinent aspects of this litigation, my review of the firm's litigation files, and consultation with other Motley Rice personnel who worked on this case. I could and would testify competently to matters set forth herein if called upon to do so.

2. Motley Rice has served as counsel in this litigation since it was filed on April 21, 2016, and has served as Co-Class Counsel since its appointment on January 24, 2017. In this capacity, my firm (often in conjunction with Co-Class Counsel) performed the following tasks,

(784 of 1275)

Case: 24-1757 Document: 32-2 Page: 333 Filed: 12/06/2024

among others: conducted a factual and legal investigation of the claims asserted; reviewed, drafted, and assisted with district-court and appellate filings; assisted in preparation for district-court and appellate oral arguments; participated in hearings; conducted limited formal and informal discovery; drafted notice documents; participated in mediation; negotiated the settlement; supervised all notice, notification, and dispute procedures implemented by the class administrator, KCC; and responded to hundreds of contacts and inquiries from class members.

3. The information in this declaration regarding the time spent on the case by Motley Rice attorneys and other professional support staff is based on contemporaneous daily time records regularly prepared and maintained by my firm. The information in this declaration regarding expenses is based on the records of my firm, which are regularly prepared and maintained in the ordinary course of business. These records are prepared from expense vouchers, check records, and other source materials that are an accurate record of the expenses incurred. I reviewed these time and expense records in connection with the preparation of this declaration.

4. The purpose of this review was to confirm both the accuracy of the time entries and expenses as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation. Time billed by any timekeeper who spent fewer than 20 hours working on the case has been excluded from my firm's lodestar.

5. The administration of this settlement to date has been novel and complex, and has required more attorney work than is typical in a class-action settlement. This settlement differs in a number of ways from typical class-action settlements. First, there is no claims procedure. Notice has been made using PACER billing data maintained by the Administrative Office of the U.S. Courts (the AO), and settlement payments also will be made based on that data in order to maximize distribution of settlement funds. This has proved to be a complicated process. For

(785 of 1275)

Case: 24-1757 Document: 32-2 Page: 334 Filed: 12/06/2024

example, the class members are the *payers* of the PACER fees, but the data maintained by the government reflects accountholder information. Sometimes the accountholders did not pay the PACER fees themselves. The most common scenario where that mismatch occurs is an employer (e.g., a law firm or corporation) directly paying its employees' PACER fees.

6. To make every effort to ensure that class members receive proper proceeds from the settlement, my firm worked with KCC to design a website that permits (1) someone who paid PACER fees on someone else's behalf (e.g., a law firm paying PACER fees incurred by its attorneys) to so notify the claims administrator (Category 1 Notification); and (2) someone whose PACER fees were paid by someone else (e.g., a lawyer at a law firm that paid its attorneys' PACER fees) to so notify the claims administrator (Category 2 Notification). Category 1 Notifications trigger a dispute procedure. For example, if a law firm submits a Category 1 Notification on the class website that it paid PACER fees for a dozen specified accounts held by individual attorneys at the firm, each of those dozen attorneys will receive an email informing them that someone has notified the claims administrator that they paid that individual's PACER fees. Those individuals will then have 10 days to dispute the accuracy of that notification. Those disputes will be resolved before any distribution of settlement proceeds. As of August 24, 2023, we have received 33 Category 1 Notifications, 386 Category 2 Notifications, and 1 dispute. The website will accept notifications through September 5, 2023.

7. Class Counsel has learned through this notification process that PACER account identifiers changed in 2014 from alphanumeric identifiers (e.g., AB1234) to seven-numeric-digit identifiers (e.g., 1234567). The data initially provided by the government did not include any alphanumeric identifiers. This presents a problem for some payers (i.e., employers who paid on behalf of their employees) whose accounting records from 2010 – 2014 reflect only alphanumeric

(786 of 1275)

Case: 24-1757 Document: 32-2 Page: 335 Filed: 12/06/2024

identifiers. We modified the website to permit submission of alphanumeric identifiers, and the government agreed in mid-August to provide a cross-walk reference permitting former alphanumeric account numbers to be linked to the replacement seven-digit account identifiers. They have not yet provided that data.

8. Last, given the nature of the claims in this case—that public access to court records should be free to the greatest extent possible—Class Counsel have made every effort to make nearly all of the filings in this case available at no cost on the class website.

9. To account for what is expected to be extensive attorney work in the coming months, handling class member contacts, notifications and disputes, I expect that my firm will spend roughly an additional 750 hours over the next six months, or roughly $500,000 in lodestar. That estimate is based on the nature of the work and time spent on these tasks since notice was sent in July.

10. As a result of this review, I believe that the time reflected in the firm's lodestar calculation and the expenses for which payment is sought as set forth in this declaration are reasonable in amount and were necessary for the effective and efficient prosecution and resolution of the litigation.

11. The current hourly rates for the attorneys and professional support staff in my firm are the usual and customary rates set by the firm in complex litigation. These hourly rates are the same as, or comparable to, the rates accepted by courts in other complex class-action litigation. My firm's rates are set based on, among other factors, periodic analysis of rates charged by firms performing comparable work and that have been approved by courts. Different timekeepers within the same employment category (e.g., members, associates, staff attorneys, paralegals, etc.) may have different rates based on a variety of factors, including years of practice, years at the firm, year

(787 of 1275)

Case: 24-1757 Document: 32-2 Page: 336 Filed: 12/06/2024

in the current position (e.g., years as a member), relevant experience, and the rates of similarly experienced peers at our firm or other firms. For personnel who are no longer employed by my firm, the "current rate" used in the lodestar calculation is based upon the rate for that individual in his or her final year of employment at Motley Rice.

Hours and Lodestar Information

12. Below is a summary lodestar chart which lists (1) the name of each timekeeper in my firm who devoted more than 20 hours to the case; (2) their title or position (e.g., member, associate, paralegal); (3) the total number of hours they worked on the case from its inception through and including August 17, 2023; (4) their current hourly rate; and (5) their lodestar (at both current and historical rates).

Name	Title	Total Hours	Current Rate	Total Lodestar
Narwold, William	Member	714.75	$1,250	$893,437.50
Oliver, Meghan	Member	570.45	$950	$541,927.50
Tinkler, William	Associate	139.15	$550	$76,532.50
Loper, Charlotte	Associate	348.40	$525	$182,910.00
Bobbitt, Ebony	Associate	86.90	$525	$45,622.50
Rublee, Laura	Staff Attorney	184.20	$500	$92,100.00
Janelle, Alice	Legal Secretary	48.60	$380	$18,468.00
Shaarda, Lynn	Paralegal	27.40	$350	$9,590.00

13. The total number of hours expended by Motley Rice in this case from inception through August 17, 2023 is 2,119.85 hours. The total resulting lodestar for my firm is $1,860,588.00 based on current rates.

(788 of 1275)

Case: 24-1757 Document: 32-2 Page: 337 Filed: 12/06/2024

Expense Information

14. My firm's lodestar figures are based on the firm's hourly rates, which do not include charges for expense items. Expense items are billed separately, and such charges are not duplicated in my firm's hourly rates.

15. My firm seeks an award of $29,654.98 for expenses and charges incurred in connection with the prosecution of the case from its inception through August 17, 2023.

16. **Mediator:** $9,925.00. Motley Rice paid Resolutions LLC for the plaintiffs' portion of mediation services, specifically provided by Professor Eric D. Green.

17. **Travel, Food, and Lodging Expenses:** In connection with the prosecution of this case, my firm spent a total of $8,496.86 on out-of-town travel, including travel costs such as airfare, lodging, and meals while traveling.

18. **Other Expenses:** The following is additional information about certain other categories of expenses:

a. Court Fees: $938.40 were paid to the Federal Circuit for my attorney admission fee, and for *pro hac vice* applications to this Court.

b. Online Legal and Factual Research: $7,605.08 was paid to Westlaw and Lexis/Nexis for online legal research and cite-checking of briefs.

c. Photocopying and Printing: $2,464.24. This includes copies and binders made in-house for hearings and the everyday prosecution of this case. It also includes the cost of a professional printer for the appellate filings in this case.

d. Telephone: $146.35. These charges were for long-distance telephone and conference calling.

e. Postage & Express Mail: $79.05.

(789 of 1275)

Case: 24-1757 Document: 32-2 Page: 338 Filed: 12/06/2024

19. In addition to the expenses incurred by my firm, Class Counsel seeks an award of $977,000 for notice and distribution of the settlement fund. This is based on notice expenses already incurred, and an estimate provided by KCC in late 2022 for settlement notice and distribution. Given complications experienced to date, we seek an additional $100,000 to account for unexpected complexities in the notification and dispute process and distribution of the settlement fund.

Dated: August 28, 2023

Respectfully submitted,

Meghan S.B. Oliver

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 1:16-cv-00745-PLF

DECLARATION OF GIO SANTIAGO REGARDING IMPLEMENTATION OF SETTLEMENT NOTICE PROGRAM

I, Gio Santiago, declare as follows:

1. My name is Gio Santiago. I have personal knowledge of the matters set forth herein.

2. I am a Senior Project Manager of Client Services at KCC Class Action Services, LLC ("KCC").

3. This declaration details the implementation of the settlement notice program ordered by the Court on May 8, 2023, and described in the Declaration of Christie K. Reed Regarding Notice Procedures (ECF# 141-4, filed on October 11, 2022) and the Supplemental Declaration of Christie K. Reed Regarding Revised Notice Procedures (ECF# 149-5, filed on April 12, 2023) ("Notice Plan").

NOTICE PLAN IMPLEMENTATION

4. KCC previously provided notice to approximately 395,081 individuals and entities,[1] identified via PACER billing records, who paid PACER billing fees between April 21,

[1] "[I]ndividuals and entities" is defined as all PACER users except the following: (1) any user who, during the quarter billed, is on the master Department of Justice list for that billing quarter; (2) any user with an @uscourts.gov email address extension; or (3) any user whose PACER bill is sent to and whose email address extension is shared with a person or entity that received PACER bills for more than one account, provided that the shared email address extension

2010 and April 21, 2016 ("Original Class Members"). The Parties subsequently agreed to extend the class period through May 31, 2018.

Data Analysis

5. On June 7, 2023, the Defendant provided contact information for approximately 368,966 Original Class Members who paid PACER fees for the first time between April 22, 2010 and April 21, 2016. Defendant also provided additional contact information for approximately 210,267 Class Members who paid PACER fees for the first time between April 22, 2016 and May 31, 2018 ("New Class Members").

6. KCC used this information to identify the total number of unique Original and New Class Members to create the class mailing list, removing Original Class Members who previously opted out of the Class.

7. KCC identified 368,966 Original Class Members and 138,023 New Class Members on the final Notice List.

Individual Notice

8. Beginning on July 6, 2023, an email notice was sent to 238,040 Original Class Member email addresses and 98,163 New Class Member email addresses identified in the Notice List. The notice content was included in the body of the email, rather than as an attachment, to avoid spam filters and improve deliverability. The email contained a link to the settlement website. The email delivery was attempted three times to maximize the probability that it would be received. Original Class Members who previously received notice and the opportunity to opt out in 2017 were sent an email Notice that provided them with the right to object to the settlement. New Class Members who were not provided with notice in 2017 were sent an email Notice that provided them with the right to opt out or object. A true and correct copy of the Email Notice that was sent to

is one of the following: @oig.hhs.gov, @sol.doi.gov, @state.gov, @bop.gov, @uspis.gov, @cbp.dhs.gov, @ussss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov. For example, accounting@dol.gov at 200 Constitution Avenue, NW, Washington, DC 20210 receives bills for johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov. None of those email addresses (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

Original Class Members is attached as **Exhibit A**. A true and correct copy of the Email Notice that was sent to New Class Members is attached as **Exhibit B**.

9. Since emailing the Notice to Class Members, KCC has received 70,557 email bounce-backs. These email bounce-backs were matched to the Notice List and a single-postcard notice was mailed to the corresponding postal address for each Class Member.

10. Beginning on July 21, 2023, a single-postcard notice was sent to 79,305 Original Class Members and 20,924 New Class Members. Original Class Members who previously received notice and the opportunity to opt out in 2017 were sent a single-postcard Notice that provided them with the right to object to the settlement. New Class Members who were not provided with notice in 2017 were sent a single-postcard Notice that provided them with the right to opt out or object. A true and correct copy of the single-postcard Notice that was sent to Original Class Members is attached as **Exhibit C**. A true and correct copy of the single-postcard Notice that was sent to New Class Members is attached as **Exhibit D**.

11. Since mailing the single-postcard Notices to Class Members, KCC has received 2,371 Notices returned by the USPS as undeliverable. Of these 1,328 have been re-mailed to new addresses obtained using credit and other public source databases.

Publication Notice

12. On July 6, 2023, KCC caused a press release to be distributed via Cision PR Newswire. The press release was issued nationwide to a variety of media, as well as to a curated list of journalists who requested to receive and commonly provide news and information about the banking industry. As of August 22, 2023, the press release has been picked up[2] a total of 380 times with exposure to potential audience of 179,636,668. The press release appeared on broadcast media, newspaper and online news websites within industries such as media and information, financial, and general news. A true and correct copy of the press release as it was posted on Cision PR Newswire's website is attached as **Exhibit E**.

[2] A pick up is a full text posting of the press release online and in social media.

13. On August 11, 2023 and August 25, 2023, KCC caused a notice, consisting of a headline, call to action, and link to the settlement website, to be published in the electronic newsletter of American Bankers Association ("ABA") *Banking Journal*. The *ABA Banking Journal eNewsletter* is delivered to over 13,250 subscribers. A true and correct copy of the notices as they appeared in *Banking Journal* is attached as **Exhibit F**.

14. Despite KCC's efforts and those made by Class Counsel, *The Slant* (*Bank Director's* e-newsletter), refused to publish the class action settlement notice.

Complexities & Complications

15. On July 26, 2023 it was discovered that 184,478 records received notice of pendency of the action in 2017, but had not received notice of the settlement. These records were matches between the 2017 class data and the 2023 original class member data. As a result, these records were considered duplicates in the system and were inadvertently excluded from the notice group. These records should have received the Notice that was sent to Original Class Members. In response, on August 7, 2023, KCC caused the Original Class Member notice (Exhibit A & Exhibit C) to be sent to these class members. Because these individuals had an opportunity to opt out in 2017, this Notice did not contain the option to opt out of the settlement.

16. On July 14, 2023 it was discovered that 53,446 records were mistakenly sent the notice that provided an opportunity to opt out. All of these individuals received notice and an opportunity to opt out in 2017. In response, on August 7, 2023, KCC caused a corrective notice to be emailed to these class members. A true and correct copy of the corrective email notice is attached as **Exhibit G**.

17. KCC researched internally and confirmed ten opt outs were submitted online from Class Members included in these 53,446 records. KCC immediately corrected its records and removed the ability for these Class Members to submit an opt out request online. As a result, seven of the Class Members who opted out received a corrective notice explaining the situation. A true and correct copy of the corrective email notice to opt outs is attached as **Exhibit H**. The remaining

three Class Members were federal agencies and Counsel determined corrective notice was not required. These ten opt outs are not included in the opt out totals in section 21 below.

Website

18. KCC has made continuous updates to the case-specific website that was established during the class certification stage. At the website, www.pacerfeesclassaction.com, Class Members are able to obtain additional information and documents about the settlement, including answers to frequently asked questions, the class notice, and nearly all filings from both the district-court proceedings and the federal circuit at no charge. In addition, users are able to update their address, submit an exclusion request form, designate someone else as the payer of their invoices, notify KCC that they paid fees on someone else's behalf, and dispute when someone claims they paid fees on their behalf.

19. During implementation, it was discovered that PACER changed user account numbers in 2014 from alphanumeric identifiers to seven-digit identifiers. The data that KCC received contained only seven-digit identifiers and the website was set-up accordingly. However, some individuals did not possess the new seven-digit identifiers making it impossible for them to submit a payee designation, payor request or dispute. Upon being notified of this constraint, Class Counsel contacted the Defendant to request a list of all corresponding alphanumeric identifiers. This information has not yet been received. Anticipating receiving the data, KCC added a functionality to the website that allowed people to enter their seven-digit identifiers or alphanumeric identifiers so payee designations, payor requests and disputes may be processed. Once Defendant provides the corresponding alphanumeric identifiers, KCC will match them to the corresponding seven-digit account numbers and distribute an email notifying accountholders of the opportunity to dispute, as appropriate.

Toll-Free Number

20. On June 7, 2023 KCC established a case-specific toll-free number to allow Class Members to call to learn more about the case in the form of frequently asked questions. The toll-

free number also allows Class Members to request to have additional information mailed to them. As of August 24, 2023, KCC has received a total of 247 calls to the telephone line.

Opt Outs

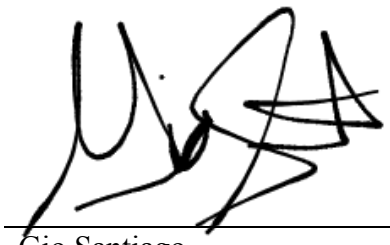
21. The exclusion deadline was August 20, 2023. As of August 24, 2023, KCC has received 39 opt out requests in 2023. Of these, 31 were submitted online and 8 were received via postal mail. One additional request was mailed to the Court. KCC expects additional timely-filed exclusion forms may arrive via postal mail over the next few weeks. A list of the exclusion requests is attached as **Exhibit I**. Of the nine total mailed requests, six were received for accounts that had an opportunity to opt out in 2017, and thus are untimely and not valid. Those requests are noted as untimely in **Exhibit I**.

Payment Designations & Disputes

22. As of August 24, 2023, KCC has received 419 Payment Designation Requests, of which 386 have been submitted by account holders informing KCC that someone paid PACER fees on their behalf and 33 have been submitted by entities informing KCC that it paid PACER fees on behalf of an account holder. In addition, KCC has received 1 Payment Dispute Notification. KCC expects additional Payment Designation Requests and Payment Dispute Notifications to be filed prior to the Final Approval Hearing.

I, Gio Santiago, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 25, 2023.



Gio Santiago

EXHIBIT A

Account ID: <<Claim8>>
PIN: <<PIN>>

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged PACER users more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Object or go to a hearing. If you paid PACER fees, you may object to any aspect of the proposed settlement. Your written objection must be sent by Tuesday, September 12th, 2023 and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA, 90030-1134.

EXHIBIT B

Account ID: <<Claim8>>
PIN: <<PIN>>

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged users of PACER (the Public Access to Court Electronic Records system) more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have first paid PACER fees between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else to participate. Class Counsel's fees and expenses will be deducted from the common fund. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. Stay in the settlement. By doing nothing, you remain part of this class action settlement. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything further to receive money from the settlement. You will be legally bound by all orders and judgments of this Court, and will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. By doing nothing you give up any rights to sue the United States government separately about the same claims in this lawsuit. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Exclude yourself from the settlement. Alternatively, you have the right to not be part of this settlement by excluding yourself or "opting out" of the settlement and Class. If you exclude yourself, you cannot get any money from the settlement, but you will keep your right to separately sue the United States government over the legal issues in this case. If you do not wish to stay in the Class, you must request exclusion in one of the following ways:

1. Send an "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from *National Veterans Legal Services Program, et al. v. United States,* Case No. 1:16-cv-00745-PLF. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.
2. Complete and submit online the Exclusion Request form found [here] by Sunday, August 20th, 2023.
3. Send an "Exclusion Request" Form, available [here], by mail. You must mail your Exclusion Request form, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

If you choose to exclude yourself from the lawsuit, you should decide soon whether to pursue your own case because your claims may be subject to a statute of limitations which sets a deadline for filing the lawsuit within a certain period of time.

OPTION 3. Stay in the Class and object or go to a hearing. If you paid PACER fees and do not opt out of the settlement, you may object to any aspect of the proposed settlement. Your written objection must be **sent by Tuesday, September 12th, 2023** and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT C

PACER Fees Class Action Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

To All PACER Users Who Paid Fees to Access Federal Court Records Between April 21, 2010 and May 31, 2018.

Your Rights Might Be Affected By a Proposed Class Action Settlement.

The back of this card provides a summary of the action.

VISIT THE SETTLEMENT WEBSITE BY SCANNING THE PROVIDED QR CODE

USO

«Barcode»
Postal Service: Please do not mark barcode

Account ID: <<Claim8>>
PIN: <<PIN>>

USO-«Claim8»-«CkDig»
«FirstName» «LastName»
«Addr1» «Addr2»
«City», «State»«FProv» «Zip»«FZip»
«FCountry»

***National Veterans Legal Services Program, et al. v. United States*, 1:16-cv-00745-PLF**

Nonprofit groups filed a class action lawsuit against the United States claiming that the government has unlawfully charged PACER users more than necessary to cover the costs of providing public access to federal court records through PACER. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC as Class Counsel. You may hire your own attorney, if you wish, at your own expense.

What are my options? If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive a share of the common fund. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at the website below no later than Tuesday, September 4th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds. You may object to any aspect of the proposed settlement. You must object by Tuesday, September 12th, 2023. If you object, you may also request to appear at the Fairness Hearing on Thursday, October 12th, 2023.

For more information: 866-952-1928 or www.pacerfeesclassaction.com

By Order of the U.S. District Court, Dated: May 8, 2023

EXHIBIT D

PACER Fees Class Action Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

To All PACER Users Who Paid Fees to Access Federal Court Records Between April 22, 2016 and May 31, 2018.

Your Rights Might Be Affected By a Proposed Class Action Settlement.

The back of this card provides a summary of the action.

VISIT THE SETTLEMENT WEBSITE BY SCANNING THE PROVIDED QR CODE

USO

«Barcode»
Postal Service: Please do not mark barcode

Account ID: <<Claim8>>
PIN: <<PIN>>

USO-«Claim8»-«CkDig»
«FirstName» «LastName»
«Addr1» «Addr2»
«City», «State»«FProv» «Zip»«FZip»
«FCountry»

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

***National Veterans Legal Services Program, et al. v. United States,* 1:16-cv-00745-PLF**

Nonprofit groups filed a class action lawsuit against the United States claiming that the government has unlawfully charged PACER users more than necessary to cover the costs of providing public access to federal court records through PACER. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees for the first time between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement

What is this case about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC as Class Counsel. You may hire your own attorney, if you wish, at your own expense. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court.

What are my options? If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive a share of the common fund. You will receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at the website below no later than Monday, September 4th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds. By participating in the settlement, you will be legally bound by all orders and judgments of the Court, and you will give up any rights to sue the United States separately about the same claims in this lawsuit. *If you do not want to be part of the settlement and the Class,* you must ask to be excluded by Sunday, August 20th, 2023. If you ask to be excluded, you will not be able to get any money from this lawsuit. You will not be bound by any of the Court's decisions and you will keep your right to sue the United States separately about the claims in this lawsuit. If you do not ask to be excluded, you may object to any aspect of the proposed settlement. You must object by Tuesday, September 12th, 2023. You may also request to appear at the Fairness Hearing on Thursday, October 12th, 2023.

For more information: 866-952-1928 or www.pacerfeesclassaction.com

By Order of the U.S. District Court, Dated: May 8, 2023

EXHIBIT E

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

NEWS PROVIDED BY
PACER Fees Class Action Administrator →
06 Jul, 2023, 08:00 ET

WASHINGTON, July 6, 2023 /PRNewswire/ -- The following statement is being issued by the PACER Fees Class Action Administrator regarding notice of proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*:

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Federal Rules of Civil Procedure and Order of the United States District Court for the District of Columbia, that the parties in *National Veterans Legal Services Program, et al. v. United States* have reached a settlement for $125,000,000, and your rights may be affected. The Court has not granted final approval of this settlement.

The Court previously certified a class of "all individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities." Members of that class were provided an opportunity to opt out in 2017.

If you paid PACER fees between April 21, 2010 and April 21, 2016, you may appear at the fairness hearing on October 12, 2023 to object to the settlement if you choose, and you may receive a settlement payment.

If you paid PACER fees for the first time between April 22, 2016 and May 31, 2018, you may choose to exclude yourself from the settlement, or you may remain a member of the class. If you choose to remain a member of the class, you may appear at the fairness hearing on October 12, 2023 to object to the settlement, and you may receive a settlement payment, but you give up your right to sue the United States government about the same claims in this lawsuit. If you exclude yourself, you cannot get any money from the settlement, but you will keep your right to separately sue the United States government over the legal issues in this case. More information about how to request exclusion and an exclusion request form can be found on the website at www.pacerfeesclassaction.com.

Settlement Payments: Settlement payments will be made by a settlement claims administrator based on PACER billing records reflecting accountholder information maintained by the Administrative Office of the U.S. Courts. If you are not a PACER accountholder, but directly paid PACER fees on behalf of someone else (e.g., a law firm or company paying fees on behalf of employees), you may be a class member, and may notify the claims administrator that you paid PACER fees on someone else's behalf www.pacerfeesclassaction.com. That notification must be made no later than September 5, 2023. If you are an accountholder and someone else directly paid your PACER fees on your behalf, you should direct payment to that person or entity at www.pacerfeesclassaction.com. You must direct payment no later than September 5, 2023. If you are an accountholder and directly paid your own PACER fees, you will automatically be mailed a check. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

Each class member (i.e., payer of PACER fees) will receive a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member for use of PACER during the Class Period (April 21, 2010 through and including May 31, 2018). The remainder will be allocated pro rata (based on the amount of PACER fees paid in excess of $350 during the Class Period) to all class members who paid more than $350 in PACER fees during the Class Period.

If there are unclaimed or undistributed funds, there will be a second distribution. The only class members who are eligible for a second distribution are those who: (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period; and (2) deposited or otherwise collected their payment from the first distribution. The administrator shall determine how many class members meet this requirement, and then distribute to each class member an equal allocation of the unclaimed or undistributed funds. No class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid for use of PACER during the Class Period.

This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the settlement agreement, visit www.pacerfeesclassaction.com, call 1-866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

DATED: July 6, 2023
BY ORDER OF THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SOURCE PACER Fees Class Action Administrator

PRN Top Stories Newsletters

Sign up to get PRN's top stories and curated news delivered to your inbox weekly!

Enter Your Email

Select Country

Submit

By signing up you agree to receive content from us.
Our newsletters contain tracking pixels to help us deliver unique content based on each subscriber's engagement and interests. For more information on how we will use your data to ensure we send you relevant content please visit our PRN Consumer Newsletter Privacy Notice. You can withdraw your consent at any time in the footer of every email you'll receive.

EXHIBIT F

ABA BANKING JOURNAL

August 11, 2023

This *ABA Banking Journal* newsletter is a free, twice-monthly supplement to the *ABA Banking Journal* magazine intended to help you stay on top of industry and policy news. You can also stay abreast of banking news by visiting aba.com/BankingJournal, home to ABA Daily Newsbytes and other email bulletins.

ServiceLink State of Homebuying Report

ServiceLink has compiled data from 1,000 potential homebuyers and homeowners to understand: how they make refinancing, home equity and homebuying decisions; how and why they rely on mortgage technology; and what they expect throughout the process.
Learn More

Advertisement

Industry News

Democratic senators urge Fed to review bank merger policy

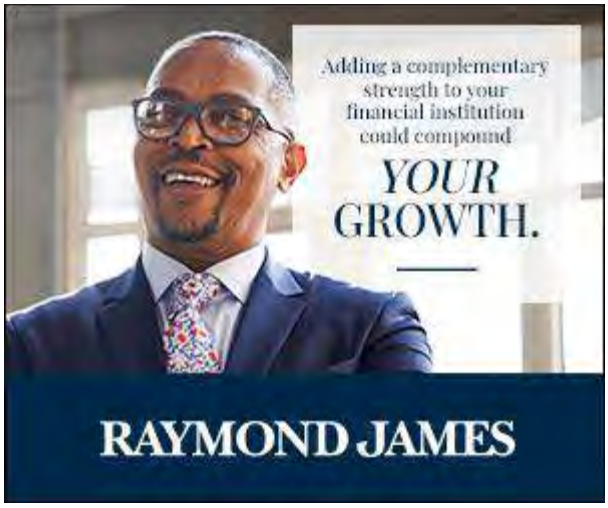
Senate Banking Committee Chairman Sherrod Brown (D-Ohio) and three Democratic committee members recently urged the Federal Reserve to review and reconsider its approach to large bank mergers, including the agency's framework for evaluating a merger's impact on financial stability.
Learn More...

State bankers associations urge CFPB to delay 1071 implementation

The CFPB should extend a court-ordered stay of its Section 1071 final rule to cover all FDIC-insured banks while the U.S. Supreme Court considers a separate legal challenge concerning the bureau, 50 state bankers associations said.
Learn More...

Fed announces new supervisory program for crypto, nonbank partnerships

The Federal Reserve announced that the banks it supervises must first receive a written notification of supervisory nonobjection from the agency before engaging with tokens using distributed ledger technology or similar technologies to facilitate payments.
Learn More...



FinCEN to launch contact center, guide for BOI reporting compliance

FinCEN will establish a contact center to assist small business owners in filing beneficial ownership reports, respond to questions from the public, and reduce regulatory burden, U.S. Treasury Undersecretary for Terrorism and Financial Intelligence Brian Nelson said.
Learn More...

FHFA weighing changes to rollout for new credit score models

The Federal Housing Finance Agency this week responded to recent industry communications expressing concerns about implementation timeframes for credit score reforms.
Learn More...

ABA, associations: Proposed auditor standards vague, overly broad

A group of 20 trade associations, including ABA, joined together to raise concerns with a proposal to expand the requirements for auditors to identify, evaluate and communicate all company violations of laws and regulations.
Learn More...

Let’s Make Banking Easier

And safer. As the heartbeat of your community, your business is built on relationships, trust, and doing the right thing – whatever it takes. Helping you unlock your potential is our commitment to you. For nearly half a century, we’ve put you and the people you serve at the center of our innovation.
Start Connecting Possibilities

Advertisement

Policy News

DOJ proposes rule on digital accessibility for state, local governments

The Justice Department recently week issued a notice of proposed rulemaking to revise the regulation implementing Title II of the Americans with Disabilities Act to establish specific requirements for making state and local governments' web content and mobile applications accessible.

Learn More...

Fed's Bowman: Further rate hikes likely

Additional increases in the federal funds rate will likely be needed to lower inflation to the Federal Reserve's 2% goal, Fed Governor Michelle Bowman said.

Learn More...

ABA, TBA ask CFPB to delay 1071 compliance dates for all banks

In the wake of a judge's order delaying compliance dates with the CFPB's Section 1071 final rule for Texas Bankers Association and ABA members, TBA and ABA today asked CFPB Director Rohit Chopra to use his discretion to apply the stay to all FDIC-insured banks.

Learn More...

Fed's Harker suggests holding rates at current level

The economy may have reached the point where the Federal Open Markets Committee can hold off further increases in the federal funds rate and let the monetary policy actions it has already taken run their course, said Patrick Harker, president of the Federal Reserve Bank of Philadelphia.

Learn More...

Missouri associations: Credit card routing bill seeks big government intervention

The Credit Card Competition Act would leave consumers with fewer choices and decreased access to credit while local banks and credit unions would be harmed by even more government intervention, the top executives of three Missouri banker and credit union associations said in an op-ed for The Missouri Times.

Learn More...

FHA proposes removing face-to-face requirement for borrowers in default

The Federal Housing Administration proposed making permanent a pandemic-related rule that waives the Department of Housing and Urban Development's requirement for mortgagees to meet in person with borrowers who are in default on their mortgage payments.

Learn More...

Notice of Proposed Class Action Settlement in PACER Fees Class Action

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.
Learn More

Advertisement

Training

August 14 - September 8
Facilitated Training: Marketing Planning

August 17
Webinar: Techniques for Building a Powerful Fraud Network

August 22
Webinar: Making a Difference in Rural Communities and Overlooked Areas

August 23
Webinar: 2023 Lights, Camera, Save! Contest

August 29
Webinar: #BanksNeverAskThat – Everything You Need to Know

August 30
Webinar: ABA's Guide to Section 1071 – A Quick Recap and a Deeper Dive

September 4 - November 26
Facilitated Training: IRA Online Institute

September 7
Webinar: Estate Planning for the Family-Owned Business Part 2 (Tax Planning)

1333 New Hampshire Avenue NW
Washington, DC 20036
1-800-BANKERS (800-226-5377)

American Bankers Association

Advertise

We would appreciate your comments or suggestions.
Your email will be kept private and confidential.

ABA BANKING JOURNAL

August 25, 2023

This *ABA Banking Journal* newsletter is a free, twice-monthly supplement to the *ABA Banking Journal* magazine intended to help you stay on top of industry and policy news. You can also stay abreast of banking news by visiting aba.com/BankingJournal, home to ABA Daily Newsbytes and other email bulletins.

Industry News

Keeping bankers smart on cybersecurity

Reinforcing employee cyber risk awareness is as critical to the maturity of your program as the products in your cyber tool set.

Learn More...

How the rating agencies missed the mark: Reassessing recent analyses of the banking sector

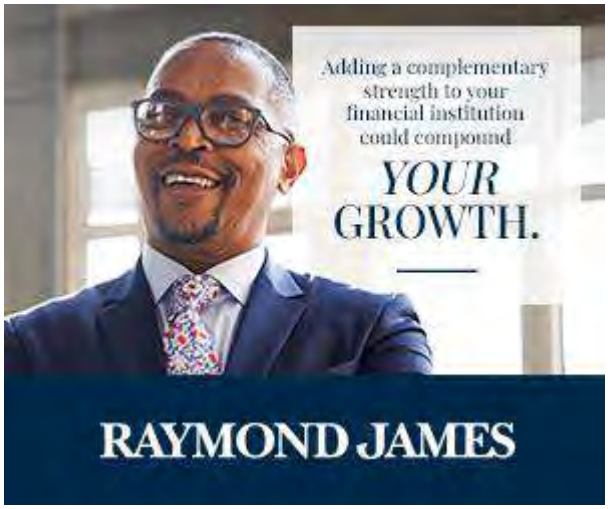
In light of the August 2023 downgrade by Moody's of several U.S. banks, as well as commentary by Fitch Ratings on the banking sector, ABA's Office of the Chief Economist is providing a brief assessment of the rating agency comments and highlighting critical flaws in some of the assumptions impacting their analyses.

Learn More...

NFIB: Small business concern about bank health fades

Small-business owners' concerns about the health of their bank have eased significantly in recent months, with more than half saying they are not concerned at all, according to a new survey of small-business attitudes about banking by the National Federation of Independent Business.

Learn More...



Survey: The changing role of bank marketing

The role of the bank marketing function is continuing to evolve to become more critical to overall enterprise, according to a new ABA survey of bank marketers. However, a considerable gap still exists between the broad and growing responsibilities of the function compared to how marketing is measured and evaluated.
Learn More...

Rising rates lead banks to rethink credit and liquidity

Banks are taking steps to reexamine their relationships with depositors, borrowers.
Learn More...

ABA Data Bank: Consumers believe Fed policies are driving disinflation

Consumers believe supply-side issues were the most important factors driving the pandemic-era surge in inflation, according to a recent Liberty Street Economics blog post.
Learn More...

Let's Make Banking Easier

And safer. As the heartbeat of your community, your business is built on relationships, trust, and doing the right thing – whatever it takes. Helping you unlock your potential is our commitment to you. For nearly half a century, we've put you and the people you serve at the center of our innovation.
Start Connecting Possibilities

Advertisement

Policy News

ABA, BPI caution against CRA rule changes

Two recent policy developments could fundamentally alter banks' Community Reinvestment Act programs, and policymakers should avoid finalizing proposed changes to the CRA rules until these issues are resolved, ABA and the Bank Policy Institute said in a letter to regulators.
Learn More...

Bipartisan support grows for ABA-backed ACRE Act

Nearly two dozen lawmakers from both political parties have signed on as cosponsors to ABA-backed legislation that would make it easier for farmers, ranchers and rural families to access affordable real estate credit.
Learn More...

ABA: Proposed quality control rule for AVMs would overburden banks

A proposed interagency rule to regulate the quality of algorithmic models used in real estate valuations would likely overburden — and therefore discourage — the very technology it is seeking to regulate, ABA said.
Learn More...

ABA urges proper implementation of new ISSB climate standard

ABA urged the ISSB to focus on the development of resources and coordination of industry-specific activities related to implementing recently released corporate disclosure standards on general sustainability and climate-related issues.
Learn More...

SEC to reopen public comment on investment advisers proposal

The Securities and Exchange Commission announced it would reopen public comment for a proposed rule that seeks to enhance protections of customer assets managed by registered investment advisers.
Learn More...

ABA urges support for affordable housing tax credit bills

Bipartisan legislation to create a neighborhood homes tax credit would address the needs of families throughout the country who are struggling to purchase homes as costs continue to rise and the supply of homes remains limited, ABA said in comments to committee leaders in the House and Senate.
Learn More...

Notice of Proposed Class Action Settlement in PACER Fees Class Action

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.
Learn More

Advertisement

Training

August 29
Webinar: Mid-Year Bank Risk Review: Analyzing Challenges and Opportunities

August 29
Webinar: #BanksNeverAskThat – Everything You Need to Know

August 30
Webinar: ABA's Guide to Section 1071 – A Quick Recap and a Deeper Dive

September 4 - November 26
Facilitated Training: IRA Online Institute

September 6
Webinar: Simplifying ATM Security Through an As a Service Strategy

September 7
Webinar: Estate Planning for the Family-Owned Business Part 2 (Tax Planning)

September 11 - October 27
Facilitated Training: Analyzing Bank Performance

September 11 - November 10
Facilitated Training: Legal Foundations in Banking

September 12
Webinar: ABA Fall Outlook Webinar

September 14
Virtual Conference: Diversity, Equity and Inclusion Summit

September 21
Webinar: How to Create an Inclusive Client Experience

September 26
Webinar: Pentegra Talks About the Benefits of Fiduciary Benchmarking Reports

1333 New Hampshire Avenue NW
Washington, DC 20036
1-800-BANKERS (800-226-5377)

American Bankers Association

Advertise

We would appreciate your comments or suggestions.
Your email will be kept private and confidential.

EXHIBIT G

Account ID: <<Claim8>>
PIN: <<PIN>>

On July 6th, 2023, you received notice informing you of the proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-CV-00745-PLF. You were inadvertently sent the notice intended for accounts that paid PACER fees for the first time between April 22, 2016 and May 31, 2018. Because you paid PACER fees between April 21, 2010 and April 21, 2016, you should have received the below notice instead.

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged PACER users more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Object or go to a hearing. If you paid PACER fees, you may object to any aspect of the proposed settlement. Your written objection must be sent by Tuesday, September 12th, 2023 and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT H

Account ID: <<Claim8>>
PIN: <<PIN>>

On July 6th, 2023, you received notice informing you of the proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-CV-00745-PLF. You were inadvertently sent the notice intended for accounts that paid PACER fees for the first time between April 22, 2016 and May 31, 2018. This notice mistakenly informed you that you had the option to opt out of the class. According to our records, you paid PACER fees between April 21, 2010 and April 21, 2016 and were previously provided an opportunity to opt out. That opt-out period expired July 17, 2017. Thus, you are no longer eligible to opt out of the class and your opt-out request will not be processed. Because you paid PACER fees between April 21, 2010 and April 21, 2016 you should have received the below notice instead. This notice does *not* provide an option to opt out.

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged PACER users more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Object or go to a hearing. If you paid PACER fees, you may object to any aspect of the proposed settlement. Your written objection must be sent by Tuesday, September 12th, 2023 and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT I

ClaimID	Year First Notice Sent	Timeliness
10034328-7	2023	Timely
10035184-0	2023	Timely
10037459-0	2023	Timely
10040932-6	2023	Timely
10041843-0	2023	Timely
10049120-0	2023	Timely
10049953-8	2023	Timely
10061501-5	2023	Timely
10065649-8	2023	Timely
10066366-4	2023	Timely
10083140-0	2023	Timely
10084333-6	2023	Timely
10085991-7	2023	Timely
10095277-1	2023	Timely
10113350-2	2023	Timely
10116080-1	2023	Timely
10118614-2	2023	Timely
10132009-4	2023	Timely
10133913-5	2023	Timely
10141727-6	2023	Timely
10147158-0	2023	Timely
10152565-6	2023	Timely
10173016-0	2023	Timely
10176126-0	2023	Timely
10182150-6	2023	Timely
10185685-7	2023	Timely
10189089-3	2023	Timely
10192998-6	2023	Timely
10196979-1	2023	Timely
10197284-9	2023	Timely
10203395-1	2023	Timely
10010161-5	2017	Untimely
10016846-9	2023	Timely
10052120-7	2023	Timely
10133913-5	2023	Timely
10156028-1	2017	Untimely
10162264-3	2017	Untimely
10274162-0	2017	Untimely
10192346-5	2017	Untimely
10320639-6	2017	Untimely

2024-1757

Volume III (Appx4356-4817)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellee.

v.

ERIC ALAN ISAACSON, Interested Party-Appellant

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

CORRECTED JOINT APPENDIX
VOLUME III (Appx4356-4817)

ERIC ALAN ISAACSON
6580 Avenida Mirola
LAW OFFICE OF ERIC ALAN ISAACSON
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
Email: ericalanisaacson@icloud.com

Interested Party-Appellant

Table of Contents

Volume II

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 16-0745 (PLF)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

The United States files this response to Plaintiffs' motion for final approval of class settlement and for attorneys' fees, costs, and service awards.[1] In short, while the United States concurs that this Court should grant final approval to the preliminary settlement and bring this long-running litigation against the federal judiciary to a close, the Court should exercise its discretion in determining attorneys' fees, costs, and service awards to Plaintiffs' and Plaintiffs' counsel. *See Hensley v. Eckhart*, 461 U.S. 424 (1983) (holding that a trial court enjoys substantial discretion in making reasonable fee determinations); *see Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). Herein, the United States provides some context and further information to aid the Court in its determination as to fees, costs, and service awards.

[1] Paragraph 20 of the Court's Order (ECF No. 153) provides the United States the ability to respond to Plaintiffs' motion for fees "thirty days" prior to the Settlement Hearing, which is scheduled for October 12, 2023. ECF No. 153 at 6.

I. The Settlement is Fair and Reasonable

First, the United States offers its concurrence that the settlement be approved. As noted by Plaintiffs, there are four factors established by Federal Rule of Civil Procedure 23(e)(2) that govern final approval. These factors consider whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate"; and "(D) the proposal treats class members equitably relative to each other." Although the United States offers no position on the first prong (*i.e.*, the class representatives and class counsel have adequately represented the class), the Government concurs that the proposal was negotiated at arm's length, that the relief provided for the class is adequate, and that the proposal treats class members equitably relative to each other. The United States will focus its response on the last two factors.

The Government agrees that the relief provided for the class is more than adequate, as described by Plaintiffs, "extraordinary." Pls.' Mot. at 28. The total value of the settlement is $125 million, and class members will be fully reimbursed, up to $350, for all PACER fees that they paid during the class period. Those who paid more than $350 in fees during the class period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. As discussed further below, this division is in line with the judiciary's long-standing policy of access to judicial records. As to the requested amount in attorneys' fees, costs, and service awards, the United States addresses that *infra* Section II.

Further, the proposal treats class members equitably relative to each other. On this particular point, the United States offers a couple considerations. First, although there was one objection by a class member regarding the payment threshold of $350, there is nothing inherently inequitable about distributing payments *pro rata* with a minimum cut-off, particularly in a

common fund case. For example, in *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2019 WL 7877812, at *2 (E.D. Mich. Dec. 20, 2019), the district court approved a pro rata distribution up to $100 then distributed the remaining funds to all class members whose weighted pro rata allocation exceeds $100 (subject to their being sufficient funds for each class member claimant to receive at least $100). *See also Downes v. Wis. Energy Corp. Ret. Account Plan*, No. 09–C–0637, 2012 WL 1410023, at *3 (E.D. Wis. April 20, 2012) (overruling an objector's objection to the plan of allocation and approving a $250 guaranteed minimum net settlement to each class member). Second, this position is consistent with the E-Government Act, 28 U.S.C. § 1913, which permits electronic public access fees to "distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." It is also consistent with "efforts undertaken by the judiciary to ensure that public access fees do not create unnecessary barriers or burdens to the public have resulted in an allocation of the vast majority of PACER maintenance costs to the system's largest users (typically commercial entities that resell PACER data for profit)." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2019 at 10, https://www.uscourts.gov/sites/default/files/judicial_conference_report_of_the_proceedings_september_2019_0.pdf (last accessed Sept. 12, 2023).

In sum, the United States concurs with this Court approving the proposed settlement. Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 121 (D.D.C. 2007).

II. Attorneys' Fees, Costs, and Service Awards

Through their motion ("Pls.' Mot.", ECF No. 158), class counsel requests an attorneys' fees award of over $23 million, which amounts to slightly less than 20% of the common fund ($125 million).[2] This amount includes approximately $900,000 in work that has not yet occurred and may or may not occur. *See* Pls.' Mot., Gupta Decl. ¶¶ 63-64, ECF No. 158-5 at 22 (noting approximately $400,000 in anticipated fees by Gupta Wessler LLP and $500,000 by Motley Rice "for time that will be incurred to address post-settlement issues and inquiries."). The Court may wish to inquire as to how counsel came to that approximation, as the declarations provided in support of Plaintiffs' motion provide little, if any, explanation for these estimates.

In addition, the declarations submitted in support of Plaintiffs' motion calculate the lodestar with 2023 hourly rates, but fail to account that the litigation began in 2016, with class certification in 2017, when rates for both firms presumably were lower. *See e.g.*, Gupta Decl. ¶ 22 (noting Gupta's "current rate" as $1,150 per hour); *see also* Oliver Decl. ¶ 12, ECF No. 158-6 at 5 (identifying William Narwold's hourly rate as $1,250 and Meghan Oliver's hourly rate as $950). In assessing whether to award current or historical rates, courts may consider, among other factors, whether the delay in payment was "unusually long [ ] or attributable to the defendant's dilatory or stalling conduct." *West v. Potter*, 717 F.3d 1030, 1034 (D.C. Cir. 2013). Such is not the case here. The Supreme Court and lower courts have held that where payment is delayed in fee-shifting cases, a court may compensate for the time value of money by either using historic billing rates plus interest or by using present-day rates. *See Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989);

[2] The parties' agreed that "when combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable." *See* Mot. Prelim. Approval, Settle. Agmt. ¶ 28, ECF No. 141-1 at 11.

Mathur v. Bd. of Tr. of S. Illinois Univ., 317 F.3d 738, 744–45 (7th Cir.2003). However, a significant number of those cases, including *Missouri v. Jenkins*, dealt specifically with fee shifting under 42 U.S.C. § 1988 in protracted civil rights litigation. This case cannot be compared to those cases, and Plaintiffs' counsel do not present any data in support of their claimed rates. *See In re LivingSocial Mktg. & Sales Pracs. Litig.*, 298 F.R.D. 1, 21-22 (D.D.C. 2013). Furthermore, as courts in this jurisdiction have noted, "[t]he market generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms—presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services." *Id*. (citing *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 46-48 (D.D.C. 2011)). Though Motley Rice appears to fall above this threshold, Gupta Wessler LLP does not.

Importantly, though Plaintiffs rely on the declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.," ECF No. 158-4) in support of the reasonableness of their fees, they have chosen (with no explanation) not to utilize the U.S. Attorney's Office Fitzpatrick Matrix (created in conjunction with the very same Brian Fitzpatrick). *See* https://www.justice.gov/usao-dc/page/file/1504361/download. This is evident because class counsel seeks compensation for Gupta's 2023 rate of $1,150, which is significantly more than the top of the Fitzpatrick Matrix rate (*see id.*, which indicates $807 per hour for attorneys with over 35 years of practice). Gupta graduated from law school in 2002, making his 2023 rate $742, approximately $408 less per hour than the rate at which he seeks compensation. *See* https://www.linkedin.com/in/deepakguptalaw (last accessed Sept. 6, 2023). Similarly, Jonathan Taylor, also a principal at Gupta Wessler LLP, seeks compensation at a rate of $935 per hour (Gupta Decl. ¶ 63), even though public records indicate that Taylor graduated law school in 2010, and his 2023 Fitzpatrick Matrix rate is

significantly lower, at $664 per hour. *See* https://www.linkedin.com/in/jonathan-taylor-071b61b. As for the Gupta Wessler firm, the lowest amount billed for an associate is $700, which is appropriate for an attorney with more than fifteen years of experience under the Fitzpatrick Matrix. https://www.justice.gov/usao-dc/page/file/1504361/download. Yet the associates identified in the Gupta Declaration range from law school graduation years of 2013 through 2015, and do not have anywhere near the 17 years' experience to justify an hourly rate of $700.

Along the same vein, the rates sought by Motley Rice are significantly above those contemplated by the Fitzpatrick Matrix. Mr. Narwold has been practicing the longest at approximately 44 years, but his 2023 rates are $807 per the Fitzpatrick Matrix, almost $450 less *per hour* than his requested rate. Oliver Decl. ¶ 12 (seeking $1,250 per hour). Oliver's rates are also higher; she is a 2004 law school graduate with approximately 19 years of experience, billing more than $150 per hour more for rates reserved for attorneys practicing over 35 years. *See* https://www.justice.gov/usao-dc/page/file/1504361/download (establishing 2023 rates for attorneys with 19 years' experience at $726 per hour).

Though not in the class action context, other judges in this District have reasoned that the Fitzpatrick Matrix "presumptively applies" in federal complex litigation. In the published opinions in this district in which the Fitzpatrick Matrix has been juxtaposed against the LSI Matrix, the Fitzpatrick Matrix has won out. *See J.T. v. District of Columbia*, Civ. A. No. 19-989 (BAH), 2023 WL 355940, at *14-15 (D.D.C. Jan. 23, 2023); *Louise Trauma Ctr. LLC v. Dep't of Homeland Sec.*, Civ. A. No. 20-1128 (TNM), 2023 WL 3478479, at *4 (D.D.C. May 16, 2023) (explaining that "Fitzpatrick Matrix rates presumptively apply" in complex federal litigation and citing *J.T.*); *see also Brackett v. Mayorkas*, Civ. A. No. 17-0988 (JEB), 2023 WL 5094872, at *4-5 (D.D.C. Aug. 9, 2023) (in employment discrimination case, reasoning that it was appropriate to apply

Fitzpatrick Matrix rates across the board and rejecting plaintiff's challenges to the Fitzpatrick Matrix and attempts to obtain even higher than LSI Matrix, attorney-specific rates); *see also Hartman v. Pompeo*, Civ. A. No. 77-2019 (APM), 2020 WL 6445873, at *19 (D.D.C. Nov. 3, 2020) (before availability of Fitzpatrick Matrix, noting in class action context that it would not be unduly burdensome to apply the LSI-adjusted matrix or "something similar," finding that plaintiffs failed to meet their burden to establish propriety of attorney-specific rates and that the court lacked the information necessary to "adjust the attorney's hourly rate in accordance with specific proof linking the attorney's ability to a prevailing market rate"). In light of Plaintiffs' failure to satisfy their burden to establish that above-market rates are appropriate in this case, *Winston & Strawn LLP v. FDIC*, 894 F. Supp. 2d 115, 130 (D.D.C. 2012) (citing *Perdue v. Kenny A.*, 559 U.S. 542 (2010)), the Court may wish to inquire as to the basis for counsels' rates, and determine whether a reduction in line with prevailing market rates pursuant to the Fitzpatrick Matrix rate is appropriate.

Plaintiffs also request payment of over $1 million to the class Administrator, including approximately $100,000 for work not yet performed. Pls.' Mot. at 48; Oliver Decl. ¶ 19. Importantly, Plaintiffs seek an extra $100,000 beyond what was originally contemplated, due to "unexpected complexities in the notification and dispute process," but do not provide any further details as to those complexities. *Id.* The Court may wish to seek further detail from Plaintiffs' as to these estimated amounts, and exercise its discretion in determining whether Plaintiffs' have adequately demonstrated that such payments are likely and/or reasonable.

Finally, the Court may wish to apply a lodestar cross-check to determine the reasonableness of the sought-after fee.[3] *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 101

[3] The United States reserved its right to request that the Court apply a lodestar crosscheck in the parties' settlement agreement. Settle. Agmt. ¶ 28, ECF No. 141-1 at 11.

(D.D.C. 2013). Plaintiffs indicate that their total lodestar (without inclusion of estimated future fees) is approximately $5.13 million. Gupta Decl. ¶ 63; *see also* Fitzpatrick Decl. ¶ 27, ECF No. 158-4 at 17. Plaintiffs seek over $23.8 million as compensation, which results in a multiplier of approximately 4.65 percent. With Plaintiffs' inchoate "anticipated future fees," this number drops to a multiplier of approximately 3.9 percent. Gupta Decl. ¶ 64. Regardless of the multiplier used, as the Fitzpatrick declaration concedes, this multiplier is "above average." Fitzpatrick Decl. ¶ 27; *see In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 19–20 (reviewing counsel's reported lodestar and finding "that a multiplier of 2.0 or less falls well within a range that is fair and reasonable"); *see also Swedish Hosp. Corp.*, 1 F.3d at 1272 (approving fee award approximately 3.3 times the lodestar amount).

In sum, "once it is determined that the attorneys are entitled to be paid from the common fund, it is the duty of the court to determine the appropriate amount," based on "reasonableness under the circumstances of a particular case." *Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area Transit Comm'n*, 3 F.3d 1568, 1573 (D.C. Cir. 1993). The Court's independent scrutiny of an award's reasonableness is particularly important in common fund cases, because "the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." *Id.* (quotation omitted); *see Swedish Hosp. Corp.*, 1 F.3d at 1265. "[W]here the settlement agreement creates a common fund against which individual plaintiffs may make claims," the Court must "'act as fiduciary for the beneficiaries'" of the fund "'because few, if any, of the action's beneficiaries actually are before the court at the time the fees are set'" and because "'there is no adversary process that can be relied upon in the setting of a reasonable fee.'" *In re Dep't of Veterans Affairs Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009). Defendant does not take issue with the

general approach of awarding Plaintiffs' counsel a percentage of the common fund in this case, but there are indicia—including above-market hourly rates that Plaintiffs' counsel have not shown to be reasonable and inadequately explained predictions of future work—that the common fund may be excessively depleted, to the detriment of class members, if Plaintiffs' counsel are awarded the percentage of the common fund that they have requested. The Court should carefully examine this fee matter to ensure that class members' rights and recovery are appropriately safeguarded.

Dated: September 12, 2023
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: /s/ *Brenda González Horowitz*
BRENDA GONZÁLEZ HOROWITZ
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2512

Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745-PLF

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR FEES, COSTS, AND SERVICE AWARDS

The Court should grant final approval of the settlement. Although this case involves perhaps the most litigious group of people and entities ever assembled in a single class action, the reception to the settlement continues to be almost universally positive. Out of a nationwide class of hundreds of thousands—including sophisticated data aggregators, federal-court litigators, and law firms of every stripe—we have received just three objections, all of them *pro se*. This reply addresses those objections and the government's response and is being filed within nine days of the hearing, as directed by the Court's preliminary-approval order. ECF No. 153 ¶ 6. It is accompanied by several supporting declarations that update the information provided with the motion, including declarations from counsel, the class administrator, and two experts (Professor Brian Fitzpatrick of Vanderbilt Law School and Professor William Rubenstein of Harvard Law School).

I. The objections regarding the settlement's fairness are misplaced. We begin by summarizing the position of the government and that of each objector regarding the settlement's overall fairness. The government agrees that the settlement is fair and "concurs that the proposal

was negotiated at arm's length, that the relief provided for the class is adequate, and that the proposal treats class members equitably relative to each other." Gov. Resp. 2. The three *pro se* objectors complain that the settlement is unfair—but in different and even contradictory ways.

A. Aaron Greenspan's objection. Mr. Greenspan notes that he "was the plaintiff in one of the only lawsuits—if not the only lawsuit—to ever challenge the PACER fee structure, prior to this one." Greenspan Obj. 1. He contends that, because he "should not have had to pay a single penny to the federal government for fees that were unlawfully charged in the first place," "all of that money should be refunded in full." *Id.* ("I want my money—stolen by the courts—back. All of it. And I want the Administrative Office staff and the judges who approved this held accountable, by name."). Mr. Greenspan believes that "the judiciary has scammed the American public." *Id.* In his view, "the plaintiffs [were] 100% right, the government [was] 100% wrong," and so any "legal limitations" on the refund of all fees paid are "manifestly unjust." *Id.* His objection was filed two days late; he has not indicated an intent to appear at the hearing.

B. Eric Alan Isaacson's objection. Mr. Isaacson, a serial class-action objector, contends that this is a "run-of-the-mill settlement" and that class counsel has "achieved a remarkably mediocre result." Isaacson Obj. 3. In his assessment, this first-ever class action against the federal judiciary "was obviously an easy one to litigate" and an "easy one to settle." *Id.* at 14. Mr. Isaacson objects to the requested fees and service awards, objections that we address separately below. With respect to the settlement's overall fairness, his complaint is that class counsel disserved the class "by advocating a purely pro-rata distribution of settlement funds"—an approach that, in his view, "favor[s] large institutional users." *Id.* at 5 ("Named Plaintiffs' advocacy for pro-rata distribution was grossly inappropriate. The 'blend' reached as a compromise allocates far too much to a pro rata distribution that unfairly advantages large users and law firms[.]"). His objection was timely; he says that he intends to appear remotely.

C. Geoffrey Miller's objection. Mr. Miller's objection is exactly the opposite: Whereas Mr. Isaacson believes that class counsel's sin was to "favor large institutional users," *id.*, Mr. Miller thinks the settlement "favor[s] smaller users." Miller Obj. 2. And while Mr. Isaacson believes that counsel advocated too vigorously for a pro rata distribution, Mr. Miller contends they didn't do so vigorously enough. He derides the settlement's allocation plan—which reimburses every PACER user for up to $350 in fees paid, with a pro rata distribution to users who paid more—as a "[r]edistribution of wealth." *Id.* Mr. Miller does not contend that he himself is an allegedly disfavored large institutional user. And no large institutional users have seen fit to object, despite their presumed access to sophisticated legal counsel. Mr. Miller "has no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for" fees and service awards. *Id.* at 1. His objection was timely; he does not plan to appear.[1]

D. Class counsel's responses to the objections. Mr. Greenspan's frustration is perhaps understandable. But his demand for a perfect settlement overlooks the fact that any settlement is necessarily a compromise—one that must be reached within the bounds of the law. Here, that law included a Federal Circuit decision holding that some of the PACER fees that were charged by the federal judiciary during the class period were lawful because they covered "expenses incurred in services providing public access to federal court docketing information." *NVLSP v. United States*, 968 F.3d 1340, 1350 (Fed. Cir. 2020). Mr. Greenspan's preferred settlement, one that would reimburse every penny paid during the class period, would be impossible in light of that ruling. He also ignores the fact that, under *this* settlement, the vast majority of class members will

[1] In addition to these three objections, the Court received an email on September 26, 2023 from Alexander Jiggetts, indicating that he "oppose[s] the settlement" because he was "the first person to complain about Pacer Fees" and has not been credited for his efforts. Mr. Jiggetts's submission is without merit. Although untimely, class counsel has no objection to the Court's consideration of this submission on its merits.

in fact receive a full refund—one hundred cents on the dollar—of PACER fees that they paid during the class period.

Mr. Isaacson's and Mr. Miller's objections are diametrically opposed. They cannot both be correct. That is, it cannot simultaneously be true that the settlement both unfairly *advantages* and unfairly *disadvantages* large institutional users. Our motion (at 21–24) already responds to Mr. Miller's objection in detail; we will not repeat all those points here. In a nutshell: The plan of allocation reflects a reasonable compromise between, on the one hand, the plaintiffs' strong advocacy for a purely pro rata distribution and, on the other, the government's longstanding policy of expanding public access for the average PACER user, the E-Government Act's express authorization that the judiciary may "distinguish between classes of persons" to "avoid unreasonable burdens and promote public access," 28 U.S.C. § 1913 note, and the government's litigating and negotiating positions. The government makes similar points in its response. Gov. Resp. 2–3.

Mr. Isaacson's objection is much harder to fathom. He identifies no authority for the puzzling notion that it was "grossly inappropriate" for the class representatives to advocate for a pro rata distribution. Isaacson Obj. 5. Although Rule 23 does not *require* a pro rata distribution, *see UAW v. GM*, 497 F.3d 615, 629 (6th Cir. 2007), it has always been true—both in modern class actions and at equity—that "fair treatment" is "assured by straightforward pro rata distribution of proceeds of litigation amongst the class." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999); *see id.* at 840–41 (explaining that, historically, "the simple equity of a pro rata distribution provid[ed] the required fairness"). Much of Mr. Isaacson's objection also rests on a basic misunderstanding of the jurisdictional framework for this case. He wrongly asserts (at 7–9) that this class action, and hence this settlement, can't include entities whose claims total more than $10,000. Not so. As this Court explained when it certified the class, "[a] suit in district court under the Little Tucker Act may seek over $10,000 in total monetary relief, as long as the right to compensation arises from separate

transactions for which the claims do not individually exceed $10,000," as is the case here. ECF No. 33 at 6; *see also* ECF No. 8 at 9–11. Mr. Isaacson's jurisdictional arguments are simply mistaken.[2]

II. The percentage fee requested (19.1%) is reasonable. The government and Mr. Isaacson also opine on various aspects of class counsel's fee request. Although their points differ in many respects, they all suffer from the same basic flaw: They treat this case as if it were a standard fee-shifting case, where fees are sought from a defendant under a fee-shifting statute (an exception to the "American rule" that each party must pay its own fees), rather than a "fee-spreading" case, where fees are sought from a common fund created for the benefit of the class (consistent with the American rule). *See In re Home Depot Inc.*, 931 F.3d 1065, 1079 n.12 (11th Cir. 2019).

A. The government's response. The government does not object to using the percentage-of-the-fund approach to determine the fee in this case—the approach used in the overwhelming majority of common-fund cases. *See* Mot. 25–27; *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."). Nor does the government deny that a fee of 19.1% is reasonable in this case and is reasonable for funds of this size. *See* Mot. 33–34 (citing

---

[2] Mr. Isaacson also contends that large institutional class members, like law firms, have "suffered no injury" to the extent that they have passed on PACER charges to their clients, so any recovery for them is an "unfair windfall." Isaacson Obj. 4–5. This, too, is mistaken. The law has long held that, if plaintiffs are harmed "in the first instance by paying [an] unreasonable charge," they may recover the full amount of the overcharges even if they have "pass[ed] on the damage" to others. *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). Indeed, damages under the Little Tucker Act are available *only* to those who paid the unlawful fee to the government—not to third-parties. *See Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1303 (Fed. Cir. 2004). Thus, as other courts have recognized, subsequent reimbursement by third parties poses no barrier to the settlement. *See AT & T Mobility Wireless Data Services Sales Tax Litigation*, 789 F. Supp. 2d 935, 967 (N.D. Ill. 2011) (rejecting objections to a class-action settlement on this ground because, "[i]f third-party employers subsequently reimbursed Class Members for the pertinent tax charges, then the question whether such Class Members must in turn reimburse their employers is a separate matter involving a question of law and equity between the employer and employee").

cases). As our motion explains, a fee award of 19.1% is well below the standard one-third recovery and is even "below the average percentage … for settlements between $69.6 and $175.5 million." *Id.* (quoting Fitzpatrick Decl. ¶ 19).

Instead, proceeding as if this were an ordinary fee-shifting case, the government directs its attention almost exclusively to the details of the lodestar calculation. But this "discussion of the lodestar and how it is calculated is an unnecessary sideshow." Fitzpatrick Supp. Decl. ¶ 2. Again, the lodestar is not the basis of the fee request, and it is relevant only to the extent that the Court believes that a cross-check is necessary. Regardless, none of the issues raised by the government require any lodestar reduction, nor provide any basis for reducing the percentage fee requested.

1. Future time. The government first correctly notes that the lodestar includes an estimate for work that had not yet been performed when the lodestar was calculated ($400,000 for Gupta Wessler and $500,000 for Motley Rice). The government does not deny that an estimate for future work is appropriate and that precision is not required. *See* Mot. 37–38 n.3 (citing cases). But, without acknowledging the relevant case law, the government asserts that there has been "little, if any, explanation for these estimates." Gov. Resp. 4. As explained in the motion, however (at 37–38 n.3), the estimates include projections for "responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal; assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise." Further, Motley Rice's projection was extrapolated from the "time spent on [class-administration] tasks since notice was sent in July." Oliver Decl. ¶ 9.

Nevertheless, class counsel have prepared supplemental declarations that provide additional support for their estimates. *See* Gupta Supp. Decl. ¶¶ 2–3; Oliver Supp. Decl. ¶¶ 3–5.

Class counsel note, for example, that the time they have spent working on the case since calculating the lodestar only confirms the reasonableness of their estimates. *Id.* And while only three class members have filed objections, the possibility of an appeal is very real given that Mr. Isaacson touts himself as "a prominent appellate litigator" who has objected to many class-action settlements and who has pursued appeals after his objections were overruled. Gupta Supp. Decl. ¶ 3.

2. Current versus historical rates. The government next contends that the lodestar should not include class counsel's current billing rates but should instead use their historical rates. Gov. Resp. 4–5. But even in fee-shifting cases (which can raise sovereign-immunity questions not present here), courts "generally" compensate for the delay "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Perdue v. Kenny A. ex. rel. Winn*, 559 U.S. 542, 556 (2010); *see, e.g.*, *James v. District of Columbia*, 302 F. Supp. 3d 213, 226–28 (D.D.C. 2018) (explaining that courts "routinely" use this approach and apply "current rates when calculating the lodestar" "to account for a delay in payment," because "it is only fair to award attorneys the present value of the services that they rendered"); *Thomas v. District of Columbia*, 908 F. Supp. 2d 233, 248–49 (D.D.C. 2012) (same). In common-fund cases, some courts go so far as to mandate use of "one of [these] two delay-compensation methods," holding that "failure to do so is an abuse of discretion." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016). Because class counsel have been working on this case for nearly eight years without compensation, it is appropriate for their lodestar to reflect their current rates to account for this delay.

3. The Fitzpatrick Matrix. The government suggests that the Court "inquire as to the basis for [class counsel's] rates" and consider using rates from "the U.S. Attorney's Office Fitzpatrick Matrix." Gov. Resp. 5–7. But as the matrix's creator himself explains, the government misunderstands its purpose. By its own terms, the Fitzpatrick Matrix is for cases "in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." *See* Fitzpatrick

Matrix, Explanatory Note 2, https://perma.cc/EVQ5-NNMC. Even then, the matrix is only "a settlement tool, designed 'to minimize fee disputes' with the Department [of Justice]" because the government has "agreed not to oppose any fee-shifting request based on the rates in the Matrix." Fitzpatrick Supp. Decl. ¶ 5 (quoting Explanatory Note 10); *see* Explanatory Note 3. For these reasons, the matrix is "irrelevant to this fee request." Fitzpatrick Supp. Decl. ¶ 5

"Nothing about the matrix precludes" counsel from seeking higher rates. *Id.* ¶ 5. That is particularly true because the matrix represents rates found in the *middle* of data from a potpourri of cases, including individual employment and FOIA matters. *Id.* ¶ 6. The rates "ranged from $100 to $1250." *Id.* As Professor Fitzpatrick explains: "Above-average lawyers commanded rates at the high end of the range and below-average lawyers at the low end. Class counsel here include some of the best class action lawyers not just in the District of Columbia, but in the entire United States of America. It is not surprising that their rates fall at the high end of the range. What is surprising is that class counsel's rates do not exceed the range altogether given that the range was drawn from data from several years ago." *Id.*

In fact, an examination of the data used in the matrix, once filtered for class-action cases, strongly supports the fee request here. As Professor William Rubenstein of Harvard Law School points out, the data underlying the Fitzpatrick Matrix is drawn largely from garden-variety fee-shifting cases and contains few class actions. Professor Rubenstein "reviewed the entire PACER docket in each of [the] 84 cases" in the Fitzpatrick dataset and "found that only 8 were class action cases and that many of the remaining 76 cases were routine fee-shifting matters." Rubenstein Decl. ¶ 21. He found, further, that "the rates in the Matrix's 8 class action cases are on average 43.98% higher than the rates in its 74 non-class action cases." *Id.* ¶ 22. "[W]hen the proposed rates in this case are plotted against the class action rates in the Fitzpatrick Matrix," Professor Rubenstein found that "the rates in this case are, on average, precisely the same as (only .65% above) the

Matrix's class action rates. What this means is that the *relevant* data that underlie the Matrix actually provide strong empirical evidence *in support of* the rates that Class Counsel propose here." *Id.* ¶ 23.

Professor Rubenstein provides additional "empirical evidence" showing that class counsel's rates "are in line with rates found in fee petitions approved by District of Columbia (and Court of Federal Claims) judges overseeing large fund class actions." *Id.* ¶ 19. He "created a database of approved fee petitions filed in large fund class actions in the District of the District of Columbia and in the Court of Federal Claims (for District of Columbia cases) since 2010, and then delved into those petitions to find the hourly rates that lawyers were billing." *Id.* ¶ 14. He "reviewed the lodestar submissions," "extracted 185 individual hourly rates of partners and associates (partnership-track attorneys)," "obtained the year of admission to the bar for each," and "adjusted all these rates to 2023 dollars." *Id.* This produced a scatterplot showing that "Class Counsel are charging rates roughly comparable to the norm" (just 9.3% above it on average), which in his view is "impressive" given that they "are among the leading class action law and plaintiff-side firms in the United States, and the lawyers who worked on this case possess years of experience, have track records of success, and can be counted among the elite of the profession generally and this area of law specifically." *Id.* ¶ 18. And class counsel's rates are, in Gupta Wessler's case, "rates that [the] firm actually charges to paying clients." Gupta Suppl. Decl. ¶ 5. The government gives no reason why this Court should ignore those rates and the empirical evidence supporting them, and instead use a fee matrix created for settlement purposes in fee-shifting cases against the federal government—"a formula that takes into account only a single factor ([] years since admission to the bar)," which "does not adequately measure [every] attorney's true market value." *See Perdue*, 559 U.S. at 554–55.

To the contrary, even in the fee-shifting context, the Federal Circuit has held that "it would be an abuse of discretion for a court to blindly use [a fee] matrix without considering all the relevant facts and circumstances." *Biery v. United States*, 818 F.3d 704, 714 (Fed. Cir. 2016). That makes sense.

When sophisticated clients shop for legal services, they look for more than just the year a lawyer passed the bar. They also consider credentials, skill level, quality of work, relevant experience, track record, and so on. It is only fitting that the rates would reflect these other variables.

In any event, even if rates from the Fitzpatrick Matrix were used, the requested fee award would still be fully justified. If the Court were to conduct a lodestar cross-check using these rates, it would show that the multiplier would still be just 5.53. *See* Gupta Supp. Decl. ¶ 6. That "is still well within the range of multipliers that resulted from previous percentage-method fee awards," and "still does not suggest there will be any windfall here: the risk this case would yield nothing far outstrips even the adjusted multiplier." Fitzpatrick Supp. Decl. ¶ 7.

4. Lodestar cross-check. Finally, the government vaguely states (at 8) that the Court "may wish" to conduct a lodestar cross-check. But the government addresses none of the points made in our motion or in Professor Fitzpatrick's declaration, which identify the problems when courts rely on lodestar calculations for common-fund fees. *See* Mot. 25–27, 35–37. If anything, the government's quibbles only underscore these problems, suggesting that the Court and counsel perform additional (and unnecessary) work to address details that have little bearing on the appropriateness of the fee. *See* Fitzpatrick Supp. Decl. ¶ 3 ("The ink that has already been spilled over class counsel's hourly rates shows why a focus on the lodestar defeats one of the principal virtues of the percentage method for setting attorneys' fees in class actions.").

But again, even if the Court were to apply a lodestar cross-check, it would simply confirm the reasonableness of the requested fee here. As explained in the motion (at 37), a multiplier of up to four is the "norm." *Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1375 (Fed. Cir. 2023); *see also In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 102 (D.D.C. 2013) (Friedman, J.) ("Multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied." (cleaned up)); *Kane Cnty. v. United States*, 145 Fed. Cl. 15, 20 (2019) (approving a

multiplier of 6.13 and collecting cases approving or referencing multipliers between 5.39 and 19.6); *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) (approving a 10.15 multiplier). A higher multiplier may be justified by the circumstances of a "particular case," including "the risk of nonpayment," the lack of significant "object[ion] to the award," and whether the notice indicated an "agreement by the class to a specified percentage." *Health Republic*, 58 F.4th at 1375–77.

The motion explains why each of these factors is present here, and the government does not contend otherwise. *See* Mot. 35–39. The government does not deny that the risks of suing the federal judiciary in this case were sky high, while the results achieved are exceptional. Gov. Resp. 2 (agreeing that the relief here is "extraordinary"). Although the government suggests (at 9) that the requested fee could be "to the detriment of class members," it does not explain what is unfair about an arrangement in which class members (1) owe no legal fees in the event that they do not prevail, (2) receive eight years of high-quality representation in a complex, risky, and novel class action, and (3) ultimately share in a $125 million settlement that (at a minimum) makes them whole up to $350, while paying less than 20% of that total in fees. Class members themselves apparently saw no unfairness in that arrangement. They were informed that, "[b]y participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court." ECF Nos. 43-1 & 44. And each named plaintiff signed a retainer agreement with class counsel providing for a contingency fee of up to 33% of the common fund. Gupta Decl. ¶ 65. This is evidence of "the market value for class counsel's services" and "certainly supports a fee award [at a smaller percentage]." *Black Farmers*, 953 F. Supp. 2d at 99–100. In fact, only one class member has objected to a fee award of 19.1%—an objection to which we now turn.

B. Mr. Isaacson's fee objection. Like the government, Mr. Isaacson urges the Court to calculate class counsel's lodestar using the Fitzpatrick Matrix (an argument that is no more

persuasive in his filing than in the government's). *See* Isaacson Obj. 13. But his principal contention is far more ambitious. He takes the position that fees in a class action should be presumptively limited to class counsel's lodestar—a position that is not the law in any circuit. For support, he cites the Supreme Court's decision in *Perdue* (which interprets language in a fee-shifting statute) and several 19th-century cases that predate Rule 23. *Id.* at 9–11. As courts have recognized in rejecting this argument and approving other settlements to which Mr. Isaacson has objected, "the *Perdue* presumption against a lodestar enhancement does not apply when a court awards fees from a common fund created after a [class-action] settlement" and no fee-shifting statute is available. *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 478–89 (S.D.N.Y. 2017) (Nathan, J.) (cleaned up); *see Fresno Cnty. Emps.' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63, 67–72 (2d Cir. 2019) (rejecting same argument by Isaacson). Every circuit to have addressed the question has held that "Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases" and "restricting the use of multipliers in statutory fee-shifting cases does not apply to common-fund cases." *Home Depot*, 931 F.3d at 1085; *see Fresno Cnty.*, 925 F.3d at 67–72; *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 564–65 (7th Cir. 1994); *Staton v. Boeing Co.*, 327 F.3d 938, 967–69 (9th Cir. 2003).

Mr. Isaacson does not cite or acknowledge any of these cases (not even the ones in which he was an objector). Nor does he cite or acknowledge the Federal Circuit's decision earlier this year reaffirming that the "percentage-of-the-fund method" is a permissible way to set fees in a common-fund class action. *Health Republic*, 58 F.4th at 1371. Nor does he have anything to say about the reasons *why* courts overwhelmingly turned away from the lodestar method in favor of the percentage approach, detailed by the D.C. Circuit in *Shalala* and by Professor Fitzpatrick in his original declaration. *See* Mot. 26. As this Court has noted, the percentage approach replicates the market, is easy to apply, and "helps to align more closely the interests of the attorneys with the interests of the parties by discouraging inflation of attorney hours and promoting efficient

prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *Black Farmers*, 953 F. Supp. 2d at 88. As against these virtues, Mr. Isaacson identifies no countervailing considerations—or any benefits at all—in favor of his preferred approach.

And his approach is quite wrong. The market for plaintiff-side services rewards results, not hours. Even if that weren't so, and plaintiffs paid their counsel by the hour, there would quite naturally be a stiff premium on the hourly rate for any arrangement in which the client (1) would not have to pay anything in legal fees in the event of a loss, (2) would never owe more than a modest percentage of their recovery in the case, and (3) would make no payments along the way.

Mr. Isaacson has no rebuttal to any of these points. He simply asserts, without support, that no multiplier at all would be warranted because the case "was obviously an easy one to litigate" and "an easy one to settle" and the results are "remarkably mediocre." Isaacson Obj. 3, 9–14. The evidence in the record, however, shows the opposite. Professor Fitzpatrick—an expert not only on class actions, but on litigation against the federal government—has set forth his view that this case was exceptionally difficult to litigate, resulting in a remarkable recovery for the class. *See* Fitzpatrick Decl. ¶¶ 20–21. And the class representatives—themselves experts on class-action settlements and litigation against the federal government (including the esoteric area of user-fee jurisprudence)—testified to the same. *See* Burbank Decl. ¶¶ 3, 5, 7–8; Rossman Decl. ¶¶ 1–2, 4–5.[3]

[3] Elsewhere, Mr. Isaacson declares that a fee of 5% of the common fund would be "wholly appropriate here" because that was what the Supreme Court found reasonable 140 years ago in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). Isaacson Obj. 12. Yet he does not grapple with the governing framework for assessing a reasonable fee under the percentage approach, or with the data showing that, even if this case were really just a "run-of-the-mill settlement," *id.* at 3, a fee of 19.1% of the common fund would be a "run-of-the-mill" percentage—indeed, a *lower*-than-average percentage—for a settlement of this size. *See* Mot. 33; Fitzpatrick Decl. ¶ 19.

In fact, even if the lodestar method were used to determine the fee in this case, as opposed to the percentage-of-the-fund approach, the record would still fully support the fee request. Using class counsel's current rates would compensate them for the years-long *delay* in payment. Using their actual rates would reflect the *quality* of their work. And applying a multiplier of under four would account for the high *risk* of nonpayment in this litigation and be fully consistent with the language in the class notice, the retainers with the named representatives, and the paucity of objections. The only difference would be that the court would have to sift through class counsel's time records and examine them line by line—a waste of judicial resources that is not required even if the Court were to conduct a lodestar cross-check. *See* Mot. 36; *Black Farmers*, 953 F. Supp. 2d at 101 n.8; *contra* Isaacson Obj. 12 (complaining that the lodestar is "inadequately documented").

III. The proposed service awards are reasonable. Finally, Mr. Isaacson objects to the requested $10,000 payments for the National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice. Courts in the D.C. and Federal Circuits routinely award such payments—known variously as service, incentive, or case-contribution awards—to class representatives. *See, e.g., Keepseagle v. Perdue*, 856 F.3d 1039, 1056 (D.C. Cir. 2017); *Cobell v. Jewell*, 802 F.3d 12, 24–25 (D.C. Cir. 2015); *Mercier v. United States*, 156 Fed. Cl. 580, 590 (2021). And courts have specifically approved of service awards for organizations where, as here, they have "provided in-house counsel" who aided in the prosecution of the case and "direct[ed] class counsel in settling the case." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002).

Mr. Isaacson asks this Court to depart from settled practice and conclude that *all* service awards are categorically barred on the basis of two 19th-century cases, *see Trustees v. Greenough*, 105 U.S. 527 (1882); *Pettus*, 113 U.S. 116 (1885), both of which predate the modern class action. But "neither *Greenough* nor *Pettus* prohibits incentive awards in class actions," and an "overwhelming majority"

of circuits "have concluded that district courts are permitted to grant incentive awards." *Moses v. N.Y. Times Co.*, 79 F.4th 235, 256 (2d Cir. 2023).[4]

Mr. Isaacson does not acknowledge this contrary authority—even though much of it comes from recent appeals in which he has unsuccessfully pressed this issue. Nor does he acknowledge the Supreme Court's recent recognition that, in a typical class action, "[t]he class representative might receive a share of class recovery above and beyond her individual claim"—for example, through a "$25,000 incentive award." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018). Because it discusses incentive awards in Rule 23 class actions, *China Agritech*—not *Greenough* or *Pettus*—is the more relevant source for guidance on the Supreme Court's view of incentive awards. And it is consistent with the prevailing view that, as the Supreme Court put it, "[t]he plaintiff who" does the work "to lead the class" may get an "attendant financial benefit." *Id.* at 1810–11.

Even if this Court were free to set aside all modern practice and precedent, this case wouldn't present the abstract legal question that Mr. Isaacson is trying to tee up under the 19th-century cases. *Greenough* allowed a bondholder, whose suit benefited others, to recover his "reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit," but held that he couldn't recover a large annual salary for his "personal services" or recoup all of his "private expenses." 105 U.S. at 537; *see Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1257 (11th Cir. 2020) (drawing this same line). Because the requested payments here fall on the right side of this

---

[4] *Accord Hyland v. Navient Corp.*, 48 F.4th 110, 123–24 (2d Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785–86 (9th Cir. 2022); *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019); *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017); *Pelzer v. Vassalle*, 655 F. App'x 352, 361 (6th Cir. 2016); *Tennille v. W. Union Co.*, 785 F.3d 422, 434–35 (10th Cir. 2015); *Berry v. Schulman*, 807 F.3d 600, 613–14 (4th Cir. 2015); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001).

line—that is, because they cover time by "counsel" "incurred in the fair prosecution of the suit"—this case doesn't present a suitable vehicle for a crusade against service awards.

Although Isaacson makes sweeping legal arguments about service awards in general, he is silent on the evidence supporting the requested awards in this case—evidence that would *fully justify the exact same awards* if relabeled as attorneys' fees. As the class representatives explained in their declarations, the market value of the in-house attorney time incurred by each organization greatly exceeded the $10,000 in claimed service awards. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2. Over seven years, experienced lawyers at each organization "performed invaluable work" that could otherwise have been performed by "outside counsel hired by each organization at far greater expense." Gupta Supp. Decl. ¶ 7. "The requested awards here are thus entirely unlike typical incentive awards: They are not for the personal services or private expenses of an individual class representative nor do they reflect any sort of personal 'salary' or 'bounty.' They instead reflect a bargain price for work that was actually performed by experienced in-house counsel and that was necessary to carry out the prosecution of this suit." *Id.*[5] Put differently: If the National Veterans Legal Services Program had hired an outside law firm to perform the same work, and had sought payment from the common fund for that work, there would be no question that it would be compensable. Indeed, it would have been compensable in full, at market rates, even if this were a

[5] Mr. Isaacson makes two other points, both belied by the evidence. *First*, he contends (at 16) that the named plaintiffs had all the incentive they needed because they had "substantial claims of their own." But the claims were for much less than the value of the in-house attorney time they expended over seven years. *See* ECF Nos. 28, 29, 30. *Second*, he complains (at 17) that the plaintiffs haven't documented their request. But, again, he ignores the fact that each organization submitted a declaration indicating that the amount of attorney time it incurred greatly exceeded $10,000 at market rates. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2.

garden-variety statutory fee-shifting case.[6] Mr. Isaacson has no explanation for why the non-profit class representatives here should be denied a more modest payment to compensate them for their substantial contributions to this groundbreaking litigation over the past seven years.

CONCLUSION

This Court should grant the motion and enter the proposed order. In addition to approving the settlement, the Court should award 20% of the settlement fund to cover attorneys' fees, notice and settlement costs, litigation expenses, and service awards. Specifically, the Court should (1) award $10,000 to each of the three class representatives, (2) award $29,654.98 to class counsel to reimburse litigation expenses, (3) order that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) award the remainder (19.1% of the settlement fund, or $23,863,345.02) to class counsel as attorneys' fees.

---

[6] *See, e.g.*, *Kay v. Ehrler*, 499 U.S. 432, 436 n.7 (1991) (observing that, under 42 U.S.C. § 1988, "Congress intended organizations to receive an attorney's fee even when they represented themselves"); *Blum v. Stenson*, 465 U.S. 886 (1984) (holding that, under section 1988, a non-profit legal services organization is entitled to an attorneys' fee based on prevailing market rates rather than its own in-house cost in providing the service); *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 929 (Fed. Cir. 2000) (en banc) (holding that time spent on litigation by a labor union's in-house staff counsel should be compensated at market rates under a fee-shifting statute); *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1569 (Fed. Cir. 1988) (awarding attorneys' fees by statute for time spent on litigation by in-house counsel).

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER LLP
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

MEGHAN S.B. OLIVER
CHARLOTTE E. LOPER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

October 3, 2023

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2023, I electronically filed this reply and related documents through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Deepak Gupta
Deepak Gupta

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Veterans Legal Services Program v. United States of America

No. 16-745

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. I filed a declaration in support of class counsel's fee request on August 28, 2023. I am submitting this supplemental declaration to respond to the questions about class counsel's lodestar calculation raised by the Department of Justice and an objector.

2. Let me begin by noting that the Department of Justice does not dispute that the percentage method is the appropriate method for calculating the attorneys' fee in this matter. Nor does the Department, or any objector, seriously refute my conclusion that an award of fees equal to approximately 19% of the cash settlement in this case is more than reasonable in light of the empirical studies and research on economic incentives in class-action litigation—especially given the novelty, complexity, duration, and risk of this seven-year litigation against the federal judiciary; the indisputably outstanding results obtained for the class; and the high quality and creativity of class counsel's legal work. As I explain below, even if class counsel's lodestar were adjusted in the ways suggested by the Department and the objector, it would not transform the *below-average* fee percentage requested here into a "windfall." Hence, the discussion of the lodestar and how it is calculated is an unnecessary sideshow.

3. The ink that has already been spilled over class counsel's hourly rates shows why a focus on the lodestar defeats one of the principal virtues of the percentage method for setting attorneys' fees in class actions. As I noted in my opening declaration, one of the many reasons that the lodestar method fell out favor in common-fund class actions to the benefit of the percentage

method is that the percentage method does not require courts to review attorney time records. To the extent that courts use a lodestar crosscheck with the percentage method—and most courts do *not, see* Fitzpatrick Decl. ¶ 22—courts try to prevent the administrative headache of the lodestar method from reappearing. They do so by treating any crosscheck as a quick, back-of-the-envelope calculation simply to ensure class counsel is not obtaining a so-called "windfall" with the percentage method. But the difference between a "windfall" and a non-"windfall" will not turn on minutiae concerning methods for calculating hours or rates. This is why the crosscheck can be done on the back of an envelope.

4. The Department and the objector question whether, in the event that a lodestar crosscheck is deemed necessary, the so-called "Fitzpatrick Matrix" must be used to calculate class counsel's lodestar. The answer is no. I developed the Fitzpatrick Matrix—pro bono—at the request of the Department—specifically, for the Civil Division of the U.S. Attorney's Office for the District of Columbia—based on the Department's desire to utilize my expertise in the empirical study of attorneys' fees. As the explanatory notes to the Matrix on the Department's website explicitly state, "the [M]atrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." *See* The Fitzpatrick Matrix, https://www.justice.gov/usao-dc/page/file/1504361/download, Explanatory Note 2. The fee sought here is not a fee that will be paid by the government pursuant to a fee-shifting statute. It is a fee that will be paid by the class pursuant to the common law of unjust enrichment. By its own terms, the Matrix is therefore irrelevant to this fee request.

5. Moreover, even in statutory fee-shifting cases, the Matrix—again, by its own terms—is not one-size-fits-all. The Matrix is a settlement tool, designed "to minimize fee disputes" with the Department. *Id.* at Explanatory Note 10. In particular, the Matrix contemplates

that parties will use non-Matrix rates when warranted; the Department simply agreed not to oppose any fee-shifting request based on the rates in the Matrix. *See id* at Explanatory Note 3 ("For matters in which a prevailing party agrees to payment pursuant to this fee matrix, the United States Attorney's Office will not request that a prevailing party offer the additional evidence that the law otherwise requires."). Class counsel's hourly rates fall above those in the Matrix. Nothing about the Matrix precludes that.

6. Indeed, to contend otherwise misconceives how the Matrix was created. The Matrix was created using a trove of data from all manner of complex cases and all manner of lawyers; the data includes individual employment-discrimination cases, FOIA cases, and Fair Debt Collection Practices Act cases, among many others. The numbers in the Matrix fall in the *middle* of this data. It was produced by least-squares regression; that is, the numbers in the Matrix minimize the distance between the data above them and the data below them. *See id.* at Explanatory Note 10. For example, the trove of data used to produce the Matrix included hourly rates that ranged from $100 to $1250 (and those rates were from several years ago). *See id.* at Explanatory Note 8. Above-average lawyers commanded rates at the high end of the range and below-average lawyers at the low end. Class counsel here include some of the best class action lawyers not just in the District of Columbia, but in the entire United States of America. It is not surprising that their rates fall at the high end of the range. What is surprising is that class counsel's rates do not exceed the range altogether given that the range was drawn from data from several years ago. In other words, if anything, the class is getting a bargain for lawyers of this caliber.

7. Finally, even if class counsel's lodestar were recalculated using the Fitzpatrick Matrix, the adjusted lodestar multiplier would still only be 5.53 (based on a total adjusted lodestar of $4,311,685.34, as explained in the supplemental declaration from class counsel). As I

demonstrated in my opening declaration, this is still well within the range of multipliers that resulted from previous percentage-method fee awards, and, for the reasons I stated there, still does not suggest there will be any windfall here: the risk this case would yield nothing far outstrips even the adjusted multiplier**.** *See* Fitzpatrick Decl. ¶ 27. The same would be true if the lodestar were adjusted in other ways suggested by the Department and the objector—for example, if class counsel's historical rather than current rates were (mistakenly) used or if the estimated future time were (mistakenly) excluded. In neither case would the multiplier fall outside a reasonable range consistent with comparable past awards nor exceed the risk of non-recovery presented by this lawsuit. Indeed, even if all of these adjustments were (mistakenly) made simultaneously the multiplier would still be within a reasonable range.

8. In short, none of the questions raised about class counsel's lodestar calculation would change anything in the end in any event. That is, after all, why it is called the percentage method.

October 1, 2023

Brian T. Fitzpatrick

Nashville, TN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLICANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs,* v. UNITED STATES OF AMERICA, *Defendant.*	Case No. 16-745-PLF

DECLARATION OF WILLIAM B. RUBENSTEIN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES

1. I am the Bruce Bromley Professor of Law at Harvard Law School and have been recognized as a leading national expert on class action law and practice. Class Counsel[1] seek a fee approximately 19% of the $125 million common fund generated by their efforts.[2] As part of their submission in support of that request, Class Counsel provided the Court with their lodestar

[1] By order dated January 24, 2017, Chief Judge Huvelle certified a class and ordered "that Gupta Wessler PLLC and Motley Rice LLC are appointed as co-lead class counsel." Order, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-ESH (D.D.C. Jan. 24, 2017), ECF No. 32 at 1. I used the shorthand "Class Counsel" to refer to these "co-lead class counsel" throughout this Declaration.

[2] Plaintiffs' Motion for Final Approval of Class Settlement and For Attorneys' Fees, Costs, and Service Awards, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158.

information (hourly billing rates and total hours).[3] In response, the Defendant has, *inter alia,* [a] noted that Class Counsel's hourly rates are higher than those found in the U.S. Attorney's Office Fitzpatrick Matrix and [b] accordingly stated that "the Court may wish to inquire as to the basis for counsels' rates, and determine whether a reduction in line with prevailing market rates pursuant to the Fitzpatrick Matrix rate is appropriate."[4] Class Counsel have retained me to address this issue. After setting forth my qualifications to serve as an expert (Part I, *infra*), I provide the Court with empirical data which would enable it to find that Class Counsel's proposed billing rates are reasonable. Specifically:

- ***Class Counsel's proposed billing rates are consistent with those utilized in large class action cases in this District*** (Part II, *infra*). My research assistants compiled a database consisting of hourly rates contained in all available court-approved fee petitions in this District (and D.C.-based Court of Federal Claims matters) since 2010 in cases with settlement funds greater than $100 million (185 data points from 6 cases). The billing rates Class Counsel propose for partners and partnership-track attorneys here are slightly (9.3%) above the rates in the comparison set. This is impressive in that the lead lawyers in this case are among the most successful class action lawyers in the country, with one (Deepak Gupta) achieving that status at a remarkably early point in his career. Their rates are appropriately at the high end of the comparison set.

- ***Data from large class actions cases are more appropriate comparators than blended matrix rates***. (Part III, *infra*). The Defendant directs the Court to rates found in the Fitzpatrick Matrix. Professor Fitzpatrick created the Matrix by collecting rates from 84 separate cases and then generating a single blended rate for each year of an attorney's experience. My research assistants and I delved into the data underlying the Fitzpatrick Matrix – all of which is available on-line – and found that only 8 of the 84 cases are class actions and many of the remaining 76 are routine fee-shifting matters.

---

[3] Declaration of Deepak Gupta, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158-5 at 22-23 [hereinafter "Gupta Dec."]; Declaration of Meghan S.B. Oliver, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 158-6 at 5-6.

[4] Defendant's Response to Plaintiffs' Motion for Final Approval of Class Settlement and Attorneys' Fees, Costs, and Service Awards, *Nat'l Veterans Legal Services Program v. United States of America*, No. 1:16-cv-0745-PLF (D.D.C. Aug. 28, 2023), ECF No. 159 at 7 [hereinafter Def. Br.].

> The 8 class action cases had, on average, more than 12 times as many docket entries as the non-class action cases. Most importantly, the hourly rates in the Matrix's 8 class action cases were roughly 44% higher than the hourly rates in its non-class action cases. Indeed, the rates Class Counsel propose here are nearly identical to – on average .65% higher than – the rates in the Matrix's 8 class action cases. A matrix generated by blending rates across a diverse set of cases may serve efficiency goals in high volume situations, where repeat-playing attorneys undertake relatively similar work case-to-case. The United States Attorney's Office (USAO) itself explains the purpose of the Matrix in these terms, offering that if prevailing litigants utilize Matrix rates, the USAO – as the paying party – will not contest those rates; Matrix rates serve as timesaving, litigation-avoiding safe harbors. That blended rates serve that function does not mean they are therefore the prevailing rates in the community for the services rendered in a particular case: as the Matrix's own underlying data show, its blended rates are not a good proxy for the rates class action lawyers in this District bill – and courts in this District approve – in class action cases.

2. In sum, data from commensurate cases provide strong empirical support for the conclusion that the hourly rates Class Counsel propose are within the normal range and these data are better points of comparison than Matrix rates blended from a database consisting almost entirely of smaller and more mundane fee-shifting matters.

I.
BACKGROUND AND QUALIFICATIONS[5]

3. I am the Bruce Bromley Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at the UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Yale, and Stanford Law Schools while a public interest lawyer during the preceding decade. I am admitted to practice law in the Commonwealth of

[5] My full c.v. is attached as Exhibit A.

Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

4. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my appended c.v.). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*. Between 2008 and 2017, I re-wrote the entire multi-volume treatise from scratch as its Fifth Edition and, subsequently, produced the treatise's Sixth Edition – *Newberg and Rubenstein on Class Actions* – which was published in 2022. As part of this effort, I wrote and published a 692-page volume (volume 5 of the Sixth Edition) on attorney's fees, costs, and incentive awards; this is the most sustained scholarly treatment of class action attorney's fees and has been cited in numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

5. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. Since 2010, the Judicial Panel on Multidistrict Litigation (JPML) has annually invited me to give a presentation on the current state of class action law at its MDL Transferee Judges Conference, and I have often spoken on the topic of attorney's fees to the MDL judges. The Federal Judicial Center invited me to participate as a panelist (on the topic

of class action settlement approval) at its March 2018 judicial workshop celebrating the 50th anniversary of the JPML, *Managing Multidistrict and Other Complex Litigation Workshop*. The Second Circuit invited me to moderate a panel on class action law at the 2015 Second Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

6. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the 2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

7. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union (ACLU) in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by

ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

8. I have been retained as an expert witness in more than 100 cases and as an expert consultant in about another 30 or so cases. These cases have been in state and federal courts throughout the United States; most have been class actions and other complex matters, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification, to the reasonableness of settlements and fees, to the preclusive effect of class action judgments. I have been retained by counsel for plaintiffs, for defendants, and for objectors.

9. Courts have appointed me to serve as an expert in complex fee matters:

- In 2015, the United States Court of Appeals for the Second Circuit appointed me to argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal.[6]

- In 2017, the United States District Court for the Eastern District of Pennsylvania appointed me to serve as an expert witness on certain attorney's fees issues in the National Football League (NFL) Players' Concussion Injury Litigation (MDL 2323). In my final report to the Court, I recommended, *inter alia*, that the Court should cap individual retainer agreements at 22%, a recommendation that the Court adopted.[7]

- In 2018, the United States District Court for the Northern District of Ohio appointed me to serve as an expert consultant to the Court on complex class action and common benefit fees issues in the National Prescription Opiate Litigation (MDL 2804).

---

[6] *See In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015), *aff'd sub nom. DeValerio v. Olinski*, 673 F. App'x 87 (2d Cir. 2016).

[7] *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *1 (E.D. Pa. Apr. 5, 2018) ("I adopt the conclusions of Professor Rubenstein and order that IRPAs' fees be capped at 22% plus reasonable costs.").

- The United States District Courts for the Southern District of New York and the Eastern District of Pennsylvania have both appointed me to serve as a mediator to resolve complex matters in class action cases, including fee issues.

10. Courts have often relied on my expert witness testimony in fee matters.[8]

11. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation is in no way contingent upon the content of my opinion.

12. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this litigation, including all of the documents posted at

[8] *See, e.g.*, *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 872 (8th Cir. 2014); *Benson v. DoubleDown Interactive, LLC*, No. 18-CV-0525-RSL, 2023 WL 3761929, at *2 (W.D. Wash. June 1, 2023); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2022 WL 18108387, at *7 (E.D. Va. Nov. 8, 2022); *Reed v. Light & Wonder, Inc.*, No. 18-CV-565-RSL, 2022 WL 3348217, at *1-2 (W.D. Wash. Aug. 12, 2022); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 (LAK), 2021 WL 2453972 (S.D.N.Y. June 15, 2021); *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617 (N.D. Cal. 2021); *Kater v. Churchill Downs Inc.*, No. 15-CV-00612-RSL, 2021 WL 511203, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Playtika Ltd.*, No. 18-CV-5277-RSL, 2021 WL 512230, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Wilson v. Huuuge, Inc.*, No. 18-CV-5276-RSL, 2021 WL 512229, at *1-*2 (W.D. Wash. Feb. 11, 2021); *Amador v. Baca*, No. 210CV01649SVWJEM, 2020 WL 5628938, at *13 (C.D. Cal. Aug. 11, 2020); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *10 (S.D. Ill. Dec. 16, 2018); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2018 WL 6305785, at *5 (M.D.N.C. Dec. 3, 2018); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *4 (E.D. Pa. Apr. 5, 2018); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 3175924, at *3 (N.D. Cal. July 21, 2017); *Aranda v. Caribbean Cruise Line, Inc.*, No. 1:12-cv-04069, 2017 WL 1369741, at *5 (N.D. Ill. Apr. 10, 2017), *aff'd sub nom. Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792 (7th Cir. 2018); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *9 (S.D.N.Y. Sept. 2, 2015); *Asghari v. Volkswagen Grp. of Am., Inc.*, No. 13-CV-02529 MMM, 2015 WL 12732462, at *44 (C.D. Cal. May 29, 2015); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2015 WL 2165341, at *5 (D. Kan. May 8, 2015); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010); *Commonwealth Care All v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013).

the case website,[9] the full docket of the case on PACER, as well as all of the publicly available documents associated with the Fitzpatrick Matrix.[10] Finally, I have reviewed the case law and scholarship relevant to the issues herein.[11]

II.
EVIDENCE SUPPORTING THE REASONABLENESS OF THE HOURLY RATES CLASS COUNSEL EMPLOY

13. The *Manual for Complex Litigation* states:

> What constitutes a reasonable hourly rate varies according to geographic area and the attorney's experience, reputation, practice, qualifications, and customary charge. The rate should reflect what the attorney would normally command in the relevant marketplace.[12]

Applying these principles, this section analyzes the rates Class Counsel propose for their partners and partnership-track attorneys.

14. My research assistants and I created a database of approved fee petitions filed in large fund class actions in the District of the District of Columbia and in the Court of Federal

---

[9] PACER Fees Class Action, Court Documents link, available at https://www.pacerfeesclassaction.com/Docs.aspx.

[10] United States Department of Justice, U.S. Attorneys, District of Columbia, Divisions, Civil Division, Attorney's Fees (encompassing links to the Fitzpatrick Matrix, 2013-2023; Supporting Materials; Declaration of Brian T. Fitzpatrick; Declaration Exhibit A; Declaration Exhibit B Declaration Exhibit C; Former Attorney's Fees Matrices, available at https://www.justice.gov/usao-dc/civil-division.

[11] I am also a class member in this case, so I have followed the case with interest.

[12] *Manual for Complex Litigation (Fourth)*, § 14.122 (2004) (citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("'[R]easonable fees' . . . are to be calculated according to the prevailing market rates in the relevant community . . . ."); *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973)).

Claims (for District of Columbia cases) since 2010,[13] and then delved into those petitions to find the hourly rates that lawyers were billing. Specifically, we searched for all class actions [a] approved by courts in this District or in the Court of Federal Claims using District of Columbia rates [b] with settlement values of $100 million or more and [c] with fee petitions providing hourly rate data available on PACER (Westlaw or Bloomberg). Using this approach, we identified 6 applicable cases, listed in Table 1, below; no case meeting these criteria was excluded and in none of these 6 cases did the courts disprove counsel's hourly rates. The Court will recognize the names of many of these cases as the large, well-known class actions in this District.

TABLE 1
D.C. BASED LARGE FUND CLASS ACTIONS

Case Name	Forum (Fee Year)	Settlement Amount
Cobell v. Salazar	D.D.C. (2011)	$1.512 billion
Haggart v. US	Fed. Cl. (2020)	$110 million
In re Fannie Mae	D.D.C. (2013)	$153 million
Keepseagle v. Vilsack	D.D.C. (2011)	$760 million
Kifafi v. Hilton	D.D.C. (2012)	$146.75 million
Mercier v. US	Fed. Cl. (2021)	$160 million

[13] I undertake this form of hourly rate analysis regularly and typically utilize a shorter time frame. However, there are fewer large class action cases in the District of Columbia than other Districts where class actions often arise (N.D. Cal. and S.D.N.Y. in particular), so we were required to go further back in time. In doing so, however, we captured most of the major class actions that this District has hosted across the past decade or so.

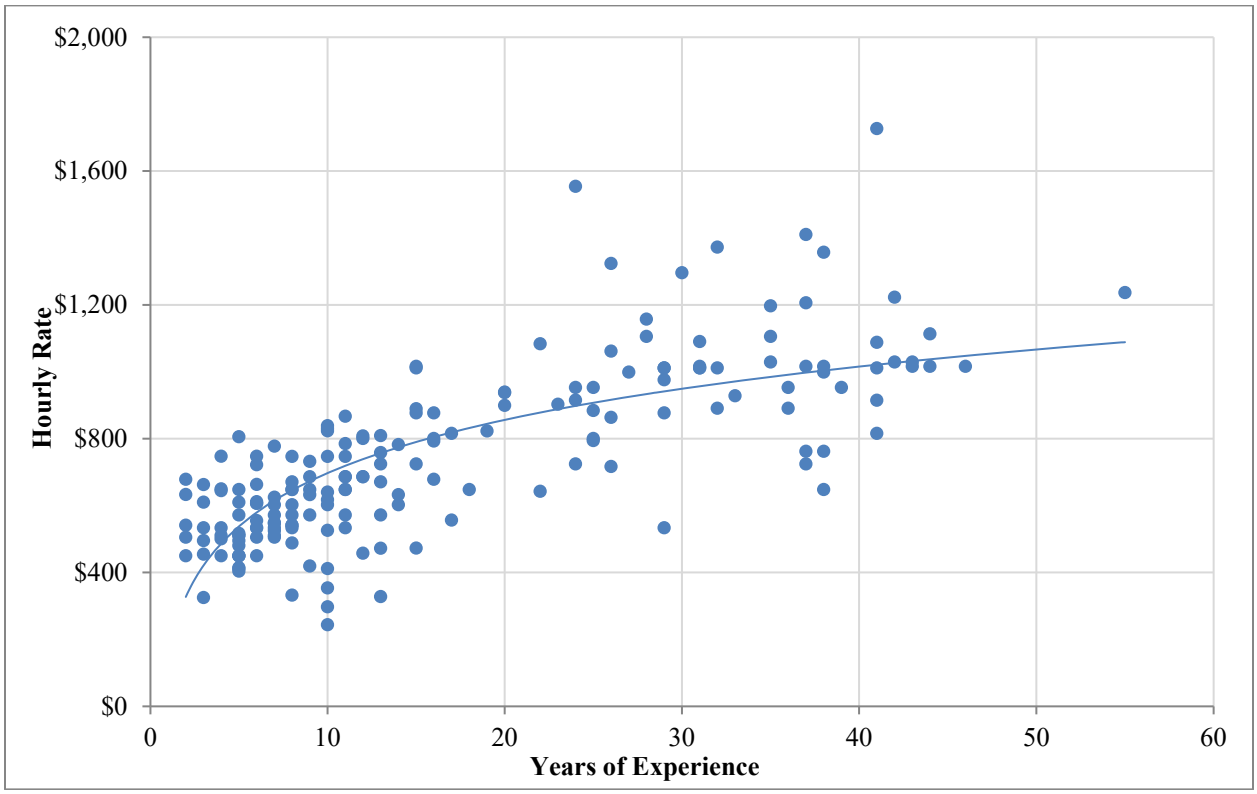
My team reviewed the lodestar submissions in each of the 6 cases and extracted 185 individual hourly rates of partners and associates (partnership-track attorneys) to employ in our analysis.[14] We adjusted all these rates to 2023 dollars using the U.S. Bureau of Labor Statistics' Producer Price Index-Office of Lawyers (PPI-OL) index.[15] We also obtained the year of admission to the bar for each of the 185 identified attorneys.

15. Once each timekeeper's experience level had been identified and all of the dollar amounts had been set to 2023 levels, we plotted the rates, with the x-axis representing the number of years since the timekeeper was admitted to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates utilized in fee petitions in large fund D.C.-based class actions, with the blue line sketching the trend of rates across experience levels.

[14] We also included one lawyer designated as "counsel," but we did not include lawyers referred to as contract or staff attorneys. The latter types of attorneys are typically paid in ways unrelated to their years of experience.

[15] This price database can be accessed here: https://www.bls.gov/ppi/databases/. To specifically access the PPI-OL, first click on "One Screen" in the "Industry Data" row below "PPI Databases." Then select "541110 Offices of lawyers" as the industry and "541110541110 Offices of lawyers" as the product.

GRAPH 1
HOURLY RATES IN D.C. LARGE FUND CLASS ACTIONS

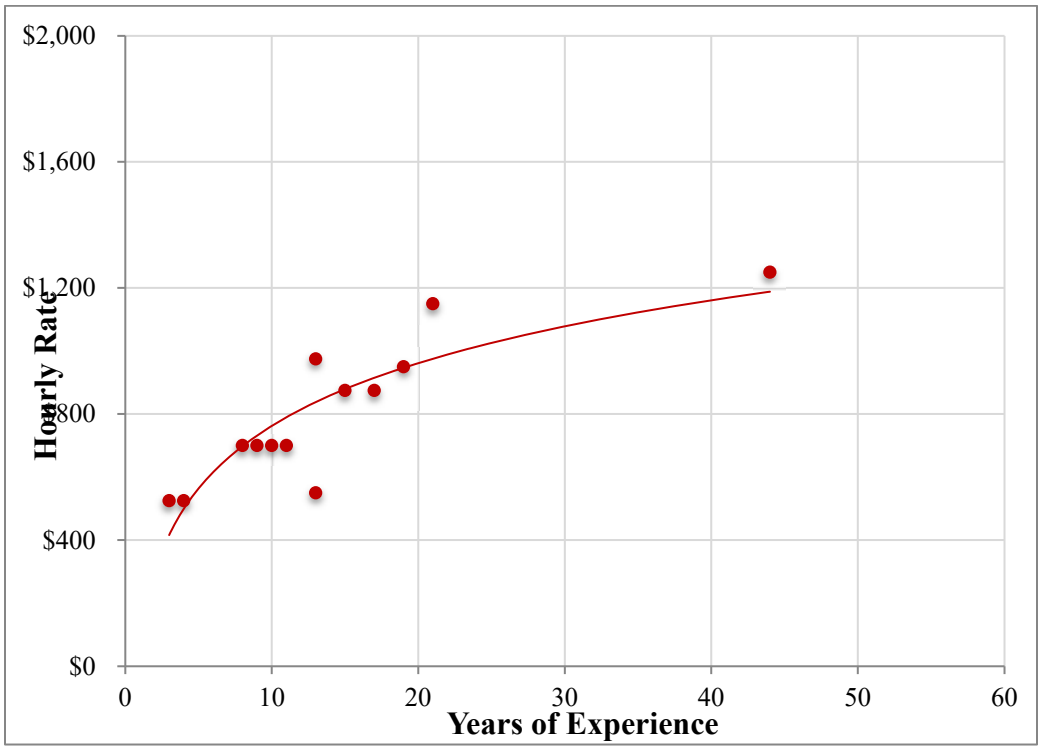


16. We next plotted the rates employed by Class Counsel in their lodestar submission. Specifically, for each of the 13 partnership-track lawyers (partners and associates) in their lodestar, Class Counsel's fee petition supplied a name and proposed hourly rate;[16] my team then found the

[16] Class Counsel utilize their rates as of 2023 for all time spent on the litigation. This approach comports with Supreme Court precedent authorizing the use of current rates as "an appropriate adjustment for delay in payment." *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989). The Defendant suggests something errant in this approach, noting that *Jenkins* was a [a] protracted [b] fee-shifting case. Def. Br. at 4-5 ("However, a significant number of those cases, including *Missouri v. Jenkins*, dealt specifically with fee shifting under 42 U.S.C. § 1988 in protracted civil rights litigation. This case cannot be compared to those cases . . ."). But this case surely hits the "protracted" mark, as it will be close to 8 years (from the filing of the initial complaint in the spring of 2016 until any final approval will vest here) during which Class Counsel have not been paid; and courts regularly accept current hourly rates in lodestar cross-check submissions in common

year of law school graduation each such timekeeper.[17] We plotted these rates onto the same type of x-y axis that we had employed for the comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Class Counsel's rates, with the red line sketching the trend of the rates across experience levels.

GRAPH 2
CLASS COUNSEL'S PROPOSED HOURLY RATES

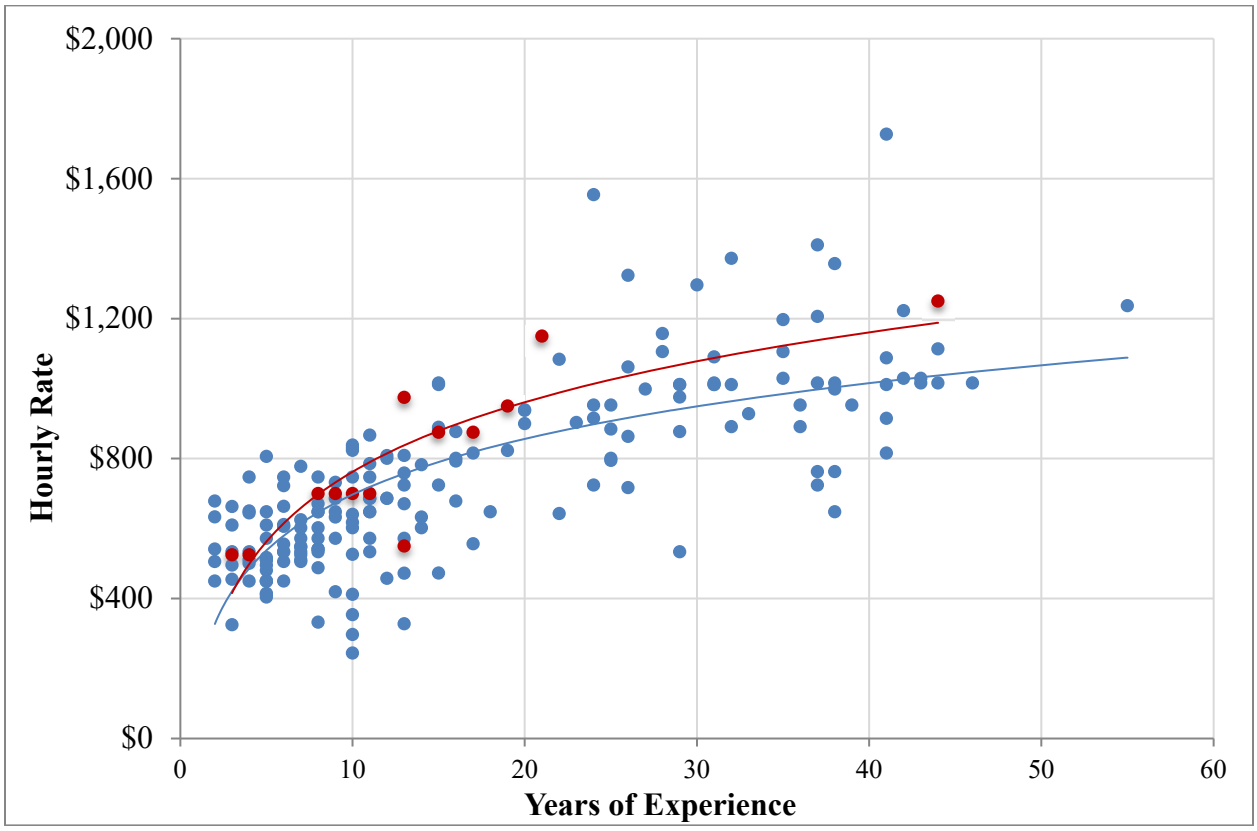


fund cases, not just fee-shifting matters. Indeed, I am unaware of any precedent holding that *Jenkins* applies only in fee-shifting matters, nor should it, as *Jenkins*'s reasoning (that counsel have not been paid for years) applies no differently when the client is paying than it does when fees are shifted to the adversary.

[17] We employed the year of law school graduation for the present lawyers, as a number of them were admitted to the bar a year or two later but gained relevant experience during federal clerkships; graduation data was also more readily available for these lawyers than the comparison set. As explained below, *see* note 19, *infra,* this choice did not meaningful alter the comparison. The Fitzpatrick Matrix similarly uses year of law school graduation as its measure of experience. Declaration of Brian T. Fitzpatrick at 6, available at https://www.justice.gov/usao-dc/page/file/1504381/download [hereinafter Fitzpatrick Dec.].

17. Finally, we aggregated Graphs 1 and 2 onto a single scatterplot, Graph 3, with District of Columbia rates in blue and Class Counsel's proposed rates in red.

GRAPH 3
CLASS COUNSEL'S PROPOSED HOURLY RATES COMPARED TO HOURLY RATES IN D.C. LARGE FUND CLASS ACTIONS



18. As is visually evident in Graph 3, the two trend lines track one another closely. When the differences between the trend lines are compared,[18] Class Counsel's trend line is on average 9.3% above the trend line for rates in fee petitions approved in other large fund class

[18] We compared the distance between the two trend lines at the 13 points for which Class Counsel have a timekeeper and took the average of those 13 comparisons.

actions.[19] That Class Counsel are charging rates roughly comparable to the norm in the present case is impressive. These firms are among the leading class action law and plaintiff-side firms in the United States, and the lawyers who worked on this case possess years of experience, have track records of success, and can be counted among the elite of the profession generally and this area of law specifically. Given that the comparison set is also composed of large fund cases, those adjectives likely apply to many of the lawyers in that set as well. And indeed, Class Counsel's proposed rates are quite close to the comparison set at most experience levels, with Class Counsel proposing hourly rates for the newest attorneys at levels less than 10% above the norm. It is Class Counsel's leading lawyers whose rates are slightly higher than the 9.3% average: Gupta, with just over two decades of experience, has accomplished more than most lawyers do in a lifetime, as noted in his Declaration;[20] while Narwold, with 44 years of experience, has participated in as many class actions as any active lawyer in the United States. As the Court can see, these two (highest red) dots alone draw the red trendline upward – but appropriately so.

[19] If we use only the year of admission for Class Counsel's lawyers, rather than their year of graduation from law school, the trend line is 12.8%, rather than 9.3%, above the comparison trend line). This difference is immaterial for purposes of this comparison and does not alter my opinion.

[20] Gupta Dec. at ¶ 46 ("I am the founding principal of Gupta Wessler LLP, a boutique law firm that focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. I am also a Lecturer on Law at Harvard Law School, where I teach the Harvard Supreme Court Litigation Clinic and regularly teach courses on the American civil-justice system. I am a public member of the American Law Institute and an elected member of the Administrative Conference of the United States . . . I have led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and numerous state and federal courts nationwide. I have also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of my advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing.").

19. In sum, this empirical evidence demonstrates that the rates Class Counsel employ in their lodestar submission are in line with rates found in fee petitions approved by District of Columbia (and Court of Federal Claims) judges overseeing large fund class actions over the past 13 years.

III.
RATES FROM CLASS ACTION CASES ARE MORE APPROPRIATE COMPARATORS THAN THE FITZPATRIC MATRIX's BLENDED RATES

20. The Defendant's brief points out that the rates Class Counsel bill are generally higher, in some cases significantly so, than the rates found in the Fitzpatrick Matrix.[21] In my opinion, rates from class action cases are more appropriate comparators for Class Counsel's rates than the blended rates set forth in the Matrix for four reasons.

21. *First,* after generating a data base of rates drawn from 84 recent fee petitions in this District, Professor Fitzpatrick created the Matrix by assigning a single rate to each level of experience; each rate is therefore blended from the rates found in the 84 separate cases. But when I reviewed the entire PACER docket in each of Professor Fitzpatrick's 84 cases, I found that only 8 were class action cases and that many of the remaining 74 cases were routine fee-shifting matters.[22] One crude reflection of this is the number of docket entries per case: in the 74 non-

[21] Def. Br. at 5-6.

[22] Two cases in Professor Fitzpatrick's database were Fair Labor Standards Act (FLSA) cases. I remove those cases from the rest of my analysis because it is difficult to characterize them as either class action or non-class action matters. *See* 7 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* §§ 24:36 to 24:38 6th ed. & Supp. Dec. 2023) (examining on-going judicial debate about the difference between FLSA "certification" and Rule 23 class certification) [hereinafter "*Newberg and Rubenstein on Class Actions*"]. However, when we included the 2 FLSA cases as either class suits or non-class suits, they had no material effect on the conclusions that follow.

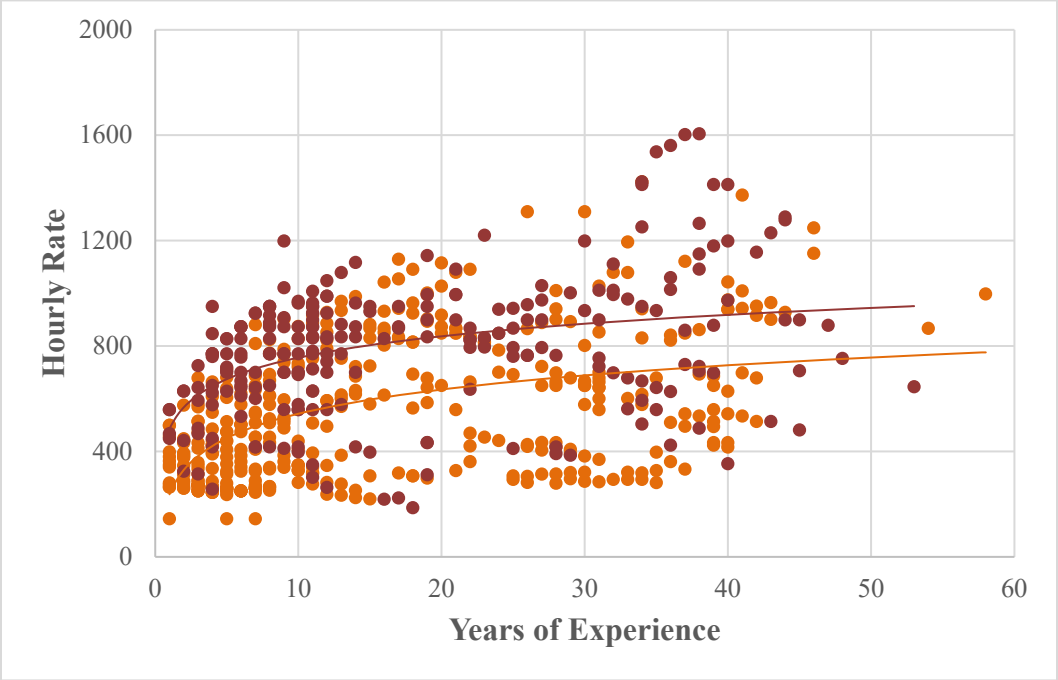
class action cases, the mean is 100 entries per case, with the median case having 54 entries, and more than 70% of those (54 out of 74) having fewer than 100 docket entries; for instance, more than 10% of the cases (8 out of 74) are simple Freedom of Information Act (FOIA) appeals, averaging about 42 docket entries each. By contrast, the average number of docket entries in the 8 class action cases is 1,207, with the median at 884.[23] Although Professor Fitzpatrick labels the Matrix rates as appropriate for "complex federal litigation,"[24] my own review of the dockets for the cases that comprise the Matrix suggests that most lack the level of novelty and complexity found in most class action cases, including this one.

22. *Second*, using the same scatterplot approach described in Part II, my research assistants compared the rates in the Matrix's 74 non-class action cases (396 data points) to the rates in its 8 class action cases (242 data points). What we found (when comparing the distance between the trendlines at the 242 points for which there were class action rates) was that the rates in the Matrix's 8 class action cases are on average 43.98% higher than the rates in its 74 non-class action cases. This scatterplot is set forth below as Graph 4, with the class action rates in red and the non-class action rates in orange.

[23] The 2 middle cases of the 8 class action matters have 850 and 918 docket entries and 884 is the midpoint of those 2.

[24] Fitzpatrick Dec. at 3 ("The cases included in the data set used to generate the hourly rate matrix constitute complex federal litigation, which caselaw establishes as encompassing a broad range of matters tried in federal court.").

GRAPH 4
MATRIX CLASS ACTION RATES COMPARED TO MATRIX NON-CLASS RATES



23. *Third,* then, when the proposed rates in this case are plotted against the class action rates in the Fitzpatrick Matrix, the rates in this case are, on average, precisely the same as (only .65% above) the Matrix's class action rates. What this means is that the *relevant* data that underlie the Matrix actually provide strong empirical evidence *in support of* the rates that Class Counsel propose here.

24. *Fourth,* using the blended Matrix rates as a point of comparison – as the Defendant's Brief implies is appropriate – confuses both the content and purpose of the Matrix.

- *Blended content*. A rate matrix reflects something like Esperanto content, blending rates from diverse cases into one flat spreadsheet. Such blended rates might be a good tool for high-volume, repeat-player situations where the differences across cases are relatively immaterial and the same attorneys often re-appear. Using a matrix approach

saves the fee-petitioning lawyers, their adversaries, and the courts, significant work.[25] But as the Matrix's own data show, in class action cases, blended matrix rates have little correlation with the actual hourly rates courts normally approve.

- *Litigation-avoidance goal.* Consistent with its blended nature, the stated goal of the Matrix is to pretermit the need for rate-related litigation across a run of cases. Specifically, the United States Attorney's Office – the party that will be *paying* the fees – explains that "[f]or matters in which a prevailing party agrees to payment pursuant to this fee matrix, [it] will not request that a prevailing party offer the additional evidence that the law otherwise requires."[26] In other words, the Matrix is an offer, in an adversarial situation, by one side to the other of a litigation safe harbor; as such, it is something of a compromise, like any dispute resolution offer.

25. Given this context, it becomes clear that proffering the Matrix as a litigation safe harbor is quite different than deploying the Matrix as evidence, which is what the Defendant attempts to do here. The Defendant's brief implies that the Matrix provides the right billing rates for this case, in other words, that these rates are those used "in the community for similar services."[27] But the Defendant makes no attempt to show that – other than to note that some courts have preferred the Fitzpatrick Matrix to other matrices or fee approaches in other cases – while

[25] This is particularly true when the matrix is updated regularly and carefully constructed, which the Fitzpatrick Matrix is, as compared to the prior *Laffey* Matrix. While I have long been a critic of the *Laffey* Matrix, *see* 5 *Newberg and Rubenstein on Class Actions* § 15:43; William B. Rubenstein, *Reasonable Rates: Time To Reload The (Laffey) Matrix,* 2 Class Action Attorney Fee Digest 47 (February 2008), available at https://billrubenstein.com/wp-content/uploads/2019/08/Rubenstein_Feb08_column.pdf, Professor Fitzpatrick's rebooting of the matrix provides an empirical basis more recent, robust, and thorough than the now 40-year old data upon which the original *Laffey* Matrix was based.

[26] U.S. Attorney's Office for the District of Columbia, Civil Division, The Fitzpatrick Matrix, Explanatory Notes, at 2 (Note 3), available at https://www.justice.gov/usao-dc/page/file/1504396/download. *See also id.*, at 1 (Note 1) ("This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney's fees . . .").

[27] *Id.* (citing *Eley v. District of Columbia*, 793 F.3d 97, 104 (D.C. Cir. 2015) (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'")).

nonetheless alleging that Class Counsel's rates are "above-market" and that the Matrix represents "prevailing market rates."[28] It is one thing for a party on the hook for fees to publish fee levels it pledges not to contest, but a different thing entirely for that party to assert that these blended safe harbor rates are "prevailing market rates" in all cases. Given the Defendant's general self-interest,[29] the blended safe harbor rates are entitled to no special deference in *litigated* rate disputes but should be put to the same test as any other proposal: do they accurately reflect prevailing rates in the community for services similar to those provided *in this case*. As shown in Part I and by the Matrix's own data, the Matrix's blended rates clearly do not reflect prevailing rates in this community for class action practitioners.

26. In sum, the blended rates in the Fitzpatrick Matrix may serve as a helpful means for avoiding rate disputes in high volume situations, where repeat-playing attorneys undertake relatively similar work case-to-case. But, as the rates found in the Matrix's 8 class action cases demonstrate, the blended rates are not a good reference point for class action cases.

* * *

[28] Def. Br. at 6-7.

[29] 5 *Newberg and Rubenstein on Class Actions*, at § 15:43 ("[I]t is particularly peculiar that courts often rely on the version of the matrix produced by the U.S. Attorney's Office for the District of Columbia, as that that office is not a neutral purveyor of the matrix: given that the government is typically the defendant in fee-shifting cases and, thus, generally the party responsible for paying the fees, it is self-interested and has an incentive to present low hourly rates. Not surprisingly, therefore, the rates calculated by the USAO are typically well below market rates in most parts of the country.").

27. I have testified that:

- Data drawn from comparable class actions in this District – in my own dataset and in the 8 class action cases in the Fitzpatrick Matrix database – provide strong support for the conclusion that the hourly billing rates Class Counsel employ in their lodestar cross-check are reasonable.

- Rates drawn from class actions are better points of comparison for Class Counsel's billing rates in this case than are blended rates drawn from a matrix, which is meant to serve as a means for avoiding rate disputes in repeat, high volume, cookie-cutter litigation.

October 2, 2023 William B. Rubenstein

EXHIBIT A

`

PROFESSOR WILLIAM B. RUBENSTEIN

Harvard Law School - AR323
1545 Massachusetts Avenue
Cambridge, MA 02138

(617) 496-7320
rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Bruce Bromley Professor of Law	2018-present
Sidley Austin Professor of Law	2011-2018
Professor of Law	2007-2011
Bruce Bromley Visiting Professor of Law	2006-2007
Visiting Professor of Law	2003-2004, 2005-2006
Lecturer in Law	1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law	2002-2007
Acting Professor of Law	1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law	1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law	1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor	Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel	1987-1995

-Litigated impact cases in federal and state courts throughout the United States.
-Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country and coordinated work with private cooperating counsel nationwide.
-Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk	1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern	Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

◊ *Author,* NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019))

◊ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (provided presentation to MDL judges on recent developments in class action law and related topics (2010, 2011, 2013-2019)

◊ *Panelist,* Federal Judicial Center, *Managing Multidistrict Litigation and Other Complex Litigation Workshop* (for federal judges) (March 15, 2018)

◊ *Amicus curiae,* authored *amicus* brief on proper approach to incentive awards in class action lawsuits in conjunction with motion for rehearing *en banc* in the United States Court of Appeals for the Eleventh Circuit (*Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020))

◊ *Amicus curiae,* authored *amicus* brief in United States Supreme Court on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, 139 S. Ct. 1041 (2019))

◊ *Amicus curiae,* authored *amicus* brief in California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016) (noting reliance on *amicus* brief))

◊ *Amicus curiae,* authored *amicus* brief in the United States Supreme Court filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

◊ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

◊ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

◊ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

◊ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

◊ "*Expert's Corner*" (Monthly Column), *Class Action Attorney Fee Digest,* 2007-2011

Judicial Appointments

◊ *Co-Mediator.* Appointed by the United States District Court for the Eastern District of Pennsylvania to help mediate a complex attorney's fees issue (*In re National Football League Players' Concussion Injury Litigation*, Civil Action No. 2:12-md-02323 (E.D. Pa. June-September 2022))

◊ *Meditator.* Appointed by the United States District Court for the Southern District of New York to mediate a set of complex issues in civil rights class action (*Grottano v. City of New York*, Civil Action No. 15-cv-9242 (RMB) (May 2020-January 2021))

◊ *Expert consultant.* Appointed by the United States District Court for the Northern District of Ohio, and Special Master, as an expert consultant on class certification and attorney's fees issues in complex multidistrict litigation (*National Prescription Opiate Litigation,* MDL 2804, Civil Action No. 1:17-md-2804 (N.D. Ohio Aug. 13, 2018; June 29, 2019; March 10, 2020))

◊ *Expert witness.* Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D. Pa. April 5, 2018))

◊ *Appellate counsel.* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom.*, *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016))

Expert Witness

◊ Submitted expert witness declarations concerning reasonableness of – and proper approach to – attorney's fees in context of issue class action judgment (*James, et al., v. PacifiCorp, et al.,* Civil Action No. 20CV33885 (Oregon Circuit Court, Multnomah Cty. 2023))

◊ Retained as an expert witness concerning reasonableness of attorney's fee request (*In re Wells Fargo & Company Securities Litigation*, Case No. 1:20-cv-04494-GHW (S.D.N.Y. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*In re Facebook, Inc. Consumer Privacy User Profile Litigation,* Civil Action No. 3:18-cv-02843-VC (N.D. Cal. 2023))

◊ Submitted expert witness declaration concerning constitutionality of proposed procedures for resolving aggregate claims within a bankruptcy proceeding (*In re PG&E Corporation and Pacific Gas and Electric Company,* Bankruptcy Case No. 19-30088 (N.D. Cal. Bankrpt. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Health Republic Insurance Company v. United States,* Civil Action No. 1:16-cv-0259C (Ct. Fed. Cl. 2023))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Benson, et al. v. DoubleDown Interactive, LLC, et al.,* Civil Action No. 2:18-cv-00525 (W.D. Wash. 2023))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fees request (*In re Twitter Inc. Securities Litigation,* Case No. 4:16-cv-05314 (N.D. Cal. October 13, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Ferrando v. Zynga Inc.,* Civil Action No. 2:22-cv-00214 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Lyft, Inc. Securities Litigation,* Case No. 4:19-cv-02690 (N.D. Cal. August 19, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Zetia (Ezetimibe) Antitrust Litigation*, MDL No. 2836, 2:18-md-2836 (E.D. Va. July 12, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Reed v. Scientific Games Corp.,* Civil Action No. 2:18-cv-00565 (W.D. Wash. 2022))

◊ Submitted an expert witness declaration concerning reasonableness of proposed settlement in nationwide securities class action, in light of competing litigation (*In re Micro Focus International PLC Securities Litigation,* Master File No. 1:18-cv-06763 (S.D.N.Y., May 4, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Americredit Financial Services, Inc., d/b/a/ GM Financial v. Bell,* No. 15SL-AC24506-01 (Twenty-First Judicial Circuit Court, St. Louis County, Missouri, March 13, 2022))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Marjory Stoneman Douglas High School Shooting FTCA Litigation*, Case No. 0:18-cv-62758 (S.D. Fla. February 7, 2022))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*City of Westland Police & Fire Ret. Sys. v. MetLife, Inc*., No. 12-CV-0256 (LAK), 2021 WL 2453972(S.D.N.Y. June 15, 2021))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Kater v. Churchill Downs,* Civil Action No. 2:15-cv-00612 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Playtika, LTD,* Civil Action No. 3:18-cv-05277 (W.D. Wash. 2020))

◊ Submitted expert witness declaration concerning reasonableness of attorney's fee request (*Wilson v. Huuuge,* Civil Action No. 3:18-cv-005276 (W.D. Wash. 2020))

◊ Submitted expert witness declarations and testified at fairness hearing concerning (1) reasonableness of attorney's fee request and (2) empirical data confirming robustness of class claims rate (*In re*

Facebook Biometric Information Privacy Litigation, Civil Action No. 3:15-cv-03747-JD (N.D. Cal. (2020))

◊ Retained as an expert witness on issues regarding the Lead Plaintiff/Lead Counsel provisions of the Private Securities Litigation Reform Act of 1995 (PSLRA) (*In re Apple Inc. Securities Litigation.,* Civil Action No. 4:19-cv-02033-YGR (N.D. Cal. (2020))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Amador v. Baca*, Civil Action No. 2:10-cv-01649 (C.D. Cal. February 9, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement (*In re: Columbia Gas Cases*, Civil Action No. 1877CV01343G (Mass. Super. Ct., Essex County, February 6, 2020))

◊ Submitted an expert witness declaration, and reply declaration, concerning reasonableness of attorney's fee request (*Hartman v. Pompeo*, Civil Action No. 1:77-cv-02019 (D.D.C. October 10, 2019; February 28, 2020))

◊ Submitted an expert witness declaration concerning reasonableness of common benefit attorney's fee request (*In re: Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724, 16-MD-2724 (E.D. Pa. May 15, 2019))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, relied upon by court in awarding fees (*Hale v. State Farm Mut. Auto. Ins. Co*., 2018 WL 6606079 (S.D. Ill. Dec. 16, 2018))

◊ Submitted expert witness affidavit and testified at fairness hearing concerning second phase fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294 (New Hampshire Superior Court, Merrimack County (2018))

◊ Submitted expert witness report – and rebutted opposing expert – concerning class certification issues for proposed class action within a bankruptcy proceeding (*In re Think Finance,* Case No. 17-33964 (N.D. Tex. Bankrpt. 2018))

◊ Submitted expert witness declaration concerning specific fee issues raised by Court at fairness hearing and second declaration in response to report of Special Master (*In re Anthem, Inc. Data Breach Litigation,* Case No. 15-MD-02617-LHK (N.D. Cal. 2018))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request following plaintiffs' verdict at trial in consumer class action (*Krakauer v. Dish Network, L.L.C.,* Civil Action No. 1:14-cv-00333 (M.D.N.C. 2018))

◊ Submitted three expert witness declarations and deposed by/testified in front of Special Master in investigation concerning attorney's fee issues (*Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, Civ. Action No. 1:11-cv-10230 (D. Mass. 2017-18))

◊ Retained as an expert witness on issues regarding the preclusive effect of a class action judgment on later cases (*Sanchez v. Allianz Life Insurance Co. of N. Amer.,* Case No. BC594715 (California Superior

Court, Los Angeles County (2018))

◊ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

◊ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

◊ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

◊ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

◊ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.*, Case No. 1:09-cv-00554 (D.R.I. (2015))

◊ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.*, Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

◊ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

◊ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

◊ Submitted an expert witness declaration and testified at Special Master proceeding concerning reasonableness of attorney's fee allocation in sealed fee mediation (2014-2015)

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

◊ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

◊ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

◊ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel, referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d

1154 (C.D. Cal. (2014))

◊ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

◊ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

◊ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

◊ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of Anet expected value@ of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

◊ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

◊ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

◊ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

◊ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

◊ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

◊ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

◊ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

◊ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

◊ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

◊ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

◊ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

◊ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

◊ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

◊ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

◊ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Retained as a consulting expert in complex MDL/class action concerning attorney's fees issues (2023)

◊ Retained as an expert in confidential matter pending in international arbitration forum concerning litigation financing issues in complex litigation (2022-2023)

◊ Retained as an expert in matter pending in several federal courts concerning attorney's fees in class action setting (2022-2023)

◊ Retained as an expert witness on class action issues in complex mass tort MDL (*In re Roundup Products Liability Litigation,* Civil Action No. 3:16-md-02741-VC (N.D. Cal. (2020))

◊ Provided expert consulting services to Harvard Law School Predatory Lending and Consumer Protection Clinic concerning complex class action issues in bankruptcy (*In re: ITT Educational Services Inc.,* Case No. 16-07207-JMC-7A (Bank. S.D. Ind. 2020))

◊ Provided expert consulting services to law firm concerning complex federal procedural and bankruptcy issues (*Homaidan v. Navient Solutions, LLC*, Adv. Proc. No. 17-1085 (Bank. E.D.N.Y 2020))

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*, No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action

(*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal. (2008))

◊ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

◊ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

◊ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

◊ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

◊ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

◊ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

◊ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

◊ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

◊ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

◊ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

◊ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

◊ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2011))

◊ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

◊ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

◊ NEWBERG AND RUBENSTEIN ON CLASS ACTIONS (6th ed. 2022); NEWBERG ON CLASS ACTIONS (sole author since 2008, sole author of entirely re-written Fifth Edition (2011-2019)

◊ *Deconstitutionalizing Personal Jurisdiction: A Separation of Powers Approach*, Harvard Public Law Working Paper No. 20-34, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715068.

◊ *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV.73 (2020) (with Francis E. McGovern)

◊ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

◊ *Procedure and Society: An Essay for Steve Yeazell*, 61 U.C.L.A. REV. DISC. 136 (2013)

◊ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

◊ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

◊ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

◊ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

◊ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

◊ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

◊ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle*, 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

◊ *The Puzzling Persistence of the AMega-Fund@ Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

◊ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

◊ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel*, 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007) (with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted

in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 24, 2023 (scheduled)

◊ *Opioid Litigation: What's New and What Does it Mean for Future Litigation?,* RAND Institute for Civil Justice and RAND Kenneth R. Feinberg Center for Catastrophic Risk Management and Compensation, RAND Corporation, October 22, 2020

◊ *The Opioid Crisis: Where Do We Go From Here?"* Clifford Symposium 2020, DePaul University College of Law, Chicago, Illinois, May 28-29, 2020)

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2019

◊ *Class Action Law Update,* MDL Transferee Judges Conference, Palm Beach, Florida, October 31, 2018

◊ *Attorneys' Fees Issues,* MDL Transferee Judges Conference, Palm Beach, Florida, October 30, 2018

◊ *Panelist,* Federal Judicial Center, Managing Multidistrict Litigation and Other Complex Litigation Workshop (for federal judges) (March 15, 2018)

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

◊ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

◊ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

◊ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

◊ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona,

January 26, 2015

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

◊ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

◊ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

◊ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

◊ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

◊ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

◊ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

◊ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

◊ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

◊ Served as *amicus curiae* and authored *amicus* brief on proper approach to *cy pres* award in class action lawsuits (*Frank v. Gaos*, No. 17-961, October Term 2018)

◊ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

◊ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011)

◊ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

◊ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

◊ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

◊ Appointed by the United States District Court for the Eastern District of Pennsylvania as an expert witness on attorney's fees in complex litigation, with result that the Court adopted recommendations (*In re National Football League Players' Concussion Injury Litigation*, 2018 WL 1658808 (E.D.Pa. April 5, 2018))

◊ Appointed by the United States District Court for the Northern District of Ohio as an expert consultant on common benefit attorney's fees issues in complex multidistrict litigation, with result that the Court adopted recommendations (*In re: Nat'l Prescription Opiate Litig*., No. 1:17-MD-2804, 2020 WL 8675733 (N.D. Ohio June 3, 2020))

◊ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *DeValerio v. Olinski*, 673 F. App'x 87, 90 (2d Cir. 2016)).

◊ Co-counsel in appeal of common benefit fees decision arising out of mass tort MDL (*In re Roundup Prod. Liab. Litig.*, Civil Action No. 21-16228, 2022 WL 16646693 (9th Cir, 2022))

◊ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016))

Consumer Class Action

◊ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.*, 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

◊ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

◊ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

◊ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

◊ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

◊ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*))

◊ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia' firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

◊ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

◊ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

◊ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

◊ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

◊ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

◊ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

◊ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2d Cir. 1994))

Prison Conditions

◊ Co-counsel in appeal of class certification decision in damages class action arising out of conditions in St. Louis City Jail, *Cody, et al v. City of St. Louis*, Civil Action No. 22-2348 (8th Cir. 2023) (pending)

Racial Equality

◊ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

◊ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005

◊ *Play It Straight*, NEW YORK TIMES, October 16, 2004

◊ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004

◊ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)

◊ *Don't Ask, Don't Tell, Don't Believe It*, NEW YORK TIMES, July 20, 1993

◊ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

◊ Massachusetts (2008)
◊ California (2004)
◊ District of Columbia (1987) (inactive)
◊ Pennsylvania (1986) (inactive)

◊ U.S. Supreme Court (1993)

◊ U.S. Court of Appeals for the First Circuit (2010)
◊ U.S. Court of Appeals for the Second Circuit (2015)
◊ U.S. Court of Appeals for the Fifth Circuit (1989)
◊ U.S. Court of Appeals for the Ninth Circuit (2004)
◊ U.S. Court of Appeals for the Eleventh Circuit (1993)
◊ U.S. Court of Appeals for the D.C. Circuit (1993)

◊ U.S. District Courts for the Central District of California (2004)
◊ U.S. District Court for the District of the District of Columbia (1989)
◊ U.S. District Court for the District of Massachusetts (2010)
◊ U.S. District Court for the Northern District of California (2010)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 16-745

SUPPLEMENTAL DECLARATION OF DEEPAK GUPTA

I, Deepak Gupta, declare as follows:

1. This supplemental declaration addresses three points made in the government's response to our motion for final approval—all of which focus exclusively on the calculation of the lodestar for our work in this case (a calculation that, for reasons explained in the motion, is not the basis of class counsel's request for attorneys' fees). I also briefly address the evidentiary basis for the requested service awards for the three class representatives.

2. *First*, the government correctly notes that the lodestar includes an estimate for work that had not yet been performed when the number was calculated—$400,000 for my firm's projected future work and $500,000 for Motley Rice's projected future work—and asserts that there has been "little, if any, explanation for these estimates." Gov. Resp. 4. As we explained in the motion (at 37–38 n.3), however, those estimates include the time that we projected we would have to spend "responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal;

assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise." Further, Meghan Oliver of Motley Rice stated in her declaration accompanying the motion that her firm expected "to spend roughly an additional 750 hours over the next six months, or roughly $500,000 in lodestar," a figure that was "based on the nature of the work" and that was extrapolated from "time spent on these tasks since notice was sent in July." Oliver Decl. ¶ 9. In other words, Motley Rice calculated its estimate by taking its average monthly lodestar for responding to inquiries in July and August and multiplying that number by six to account for six additional months of similar work.

3. Since we calculated our lodestar, the reasonableness of our projected totals for future work have only been further confirmed. My firm has already spent more than 100 hours working on the case since then (yielding a lodestar of more than $100,000 at our current billing rates). That includes time spent editing and finalizing the motion for final approval (which was not included in the original total because it occurred after the calculations had been run), and time spent evaluating and responding to the government and the objectors. We expect to spend additional time preparing for the upcoming fairness hearing and assisting class members with any legal questions they might have. And while only three class members out of hundreds of thousands have come forward to object, the possibility of an appeal is very real given that one of the objectors (Eric Alan Isaacson) touts himself on his website as "a prominent appellate litigator," *see* https://www.ericalanisaacson.com/appellate-practice/, and has been described by courts as a "professional objector[] who threaten[s] to delay resolution of class action cases unless they receive extra compensation," *Muransky v. Godiva Chocolatier, Inc.*, 2016 WL 11601079, at *3 (S.D. Fla. 2016). Were there an appeal, it could easily require an additional $200,000 or more of lodestar. Given this possibility, and given the work we have already performed since calculating our lodestar as well as the unusual size and complexity of this settlement's administration, it continues to be my

belief that my firm's estimate of $400,000 in future lodestar is reasonable and, indeed, conservative. And given that Motley Rice's estimated future lodestar was based on an extrapolation from representative data, I remain convinced that their projection of $500,000 is equally reasonable.

4. *Second*, the government suggests that our firm's rates should be adjusted downward because we are a small firm and the market for legal services "generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms—presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services." Gov. Resp. 5. To the extent the government is suggesting that attorneys of equal experience, skill, and reputation are compensated more highly by the market *solely* because they work at a large law firm (such as DLA Piper, with approximately 3,800 lawyers), that has not been my experience. Some of the nation's best advocates, who command high hourly rates, work at small law firms with far fewer than "100 lawyers" (such as Clement & Murphy PLLC, with 13 lawyers). *Contra* Gov. Resp. 5. And all other factors being equal, large law firms' "greater resources and investments" in staff, technology, and the like create economies of scale that, if anything, should allow them to charge their clients *lower* hourly rates. Likewise, having more attorneys and more staff to devote extra hours to a case does not in any way allow large law firms to charge their clients higher hourly rates for those additional hours. Again, in my experience, the opposite is true. In reality, large law firms frequently end up charging lower hourly rates to their corporate clients (who often have leverage of their own). *See, e.g.*, Lisa Ryan, *BigLaw Will Discount Deep To Keep Big Clients Happy*, Law360 (Aug. 5, 2014), https://perma.cc/Z2YQ-BWVH; Jennifer Smith, *On Sale: The $1,150-Per-Hour Lawyer: Lawyer Fees Keep Growing, But Don't Believe Them. Clients Are Demanding, and Getting, Discounts*, Wall St. J. (Apr. 3, 2013), https://perma.cc/TSW8-Q346.

5. *Third*, the government suggests that our billing rates are higher than the market would bear, and that the Court should "inquire as to the basis for [those] rates" and determine whether to instead use rates contained in a fee matrix prepared by our expert Brian Fitzpatrick at the request of the Department of Justice for purposes of settling fee disputes in statutory fee-shifting cases against the federal government. Gov. Resp. 7. To be clear, the rates we have quoted are rates that our firm *actually charges* to paying clients. So, by definition, these are rates that the market will bear. Moreover, as Mr. Fitzpatrick explains in his supplemental declaration, his fee matrix is wholly irrelevant here for numerous reasons—among others, that it is designed for ordinary statutory fee-shifting cases; that it is a settlement matrix that sets a floor, not a ceiling; and that it uses data from garden-variety litigation, such as individual employment-discrimination cases. Nevertheless, I have recalculated our original lodestar using the hourly rates from this matrix, and they are as follows:

Name	Title	Total Hours	Year	Fitzpatrick Matrix Rate	Total Matrix Lodestar
Deepak Gupta	Principal	1497.5	2002	742	$1,111,145.00
Jonathan E. Taylor	Principal	1519	2010	664	$1,008,616.00
Rachel Bloomekatz	Principal	5.73	2008	687	$3,936.51
Peter Romer-Friedman	Principal	3.00	2006	707	$2,121.00
Daniel Wilf-Townsend	Associate	12.60	2015	598	$7,534.80
Joshua Matz	Associate	6.40	2012	638	$4,083.20
Neil Sawhney	Associate	3.30	2014	612	$2,019.60
Robert Friedman	Associate	2.60	2013	625	$1,625.00
Stephanie Garlock	Paralegal	27.55	-	220	$6061.00
Mahek Ahmad	Paralegal	52.75	-	220	$11,605.00
Rana Thabata	Paralegal	24.62	-	220	$5,416.40
Nabila Abdallah	Paralegal	17.57	-	220	$3,865.40
Total Past Lodestar					$2,168,028.91

6. As this chart shows, my firm's total lodestar for past work, when recalculated using the Fitzpatrick matrix, would be $2,168,028.91. As Ms. Oliver explains in her supplemental

declaration, her firm's total lodestar for past work, when recalculated using the Fitzpatrick matrix, would be $1,480,645.35. These figures would result in a corresponding reduction to the projected future lodestar for our two firms. Specifically, my firm's projected future lodestar would become $265,113.92 using the Fitzpatrick matrix ($400,000 x $2,168,028.91/$3,271,090.25), while Motley Rice's projected future lodestar would become $397,897.16 ($500,00 x $1,480,645.35/$1,860,588). Add it all up, and our total adjusted lodestar would be $4,311,685.34, which produces a multiplier of 5.53.

7. One final point bears mention. Mr. Isaacson challenges the propriety of awarding $10,000 per class representative for their contributions to this case. But he does not grapple with the evidentiary basis for that request. Throughout the seven years of this litigation, experienced in-house lawyers at the National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice performed invaluable work that was necessary to prosecute this case effectively and ethically. Had they not performed that work on the litigation, the same work would have had to be performed by class counsel or, perhaps more likely, by other outside counsel hired by each organization at far greater expense. As the declarations of Renée Burbank, Stuart Rossman, and Rakim Brooks explain, the market value of the attorney time incurred by each of the three organizations over seven years greatly exceeded $10,000 at market rates. The requested awards here are thus entirely unlike typical incentive awards: They are not for the personal services or private expenses of an individual class representative nor do they reflect any sort of personal "salary" or "bounty." They instead reflect a bargain price for work that was actually performed by experienced in-house counsel and that was necessary to carry out the prosecution of this suit.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed in Washington, DC, on October 3, 2023. */s/ Deepak Gupta*
Deepak Gupta

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 1:16-cv-00745-PLF

DECLARATION OF MEGHAN S.B. OLIVER

I, Meghan S.B. Oliver, declare as follows:

1. I am a member of the law firm of Motley Rice LLC ("Motley Rice"). I submit this declaration in further support of Class Counsel's application for an award of attorneys' fees in connection with services rendered in the above-captioned class action. I have personal knowledge of the matters set forth herein, based upon my active participation in all pertinent aspects of this Litigation, my review of the firm's litigation files, and consultation with other Motley Rice personnel who worked on this case. I could and would testify competently to matters set forth herein if called upon to do so.

2. The government has suggested that the U.S. Attorney's Office's "Fitzpatrick Matrix" would be a better measure of the market rates for our attorneys' work than our actual billing rates. For all the reasons explained by Professor Fitzpatrick himself in his supplemental declaration, we do not agree that the Matrix is relevant here. But we have nevertheless recalculated our lodestar using the Matrix. Below is a revised summary lodestar chart which lists (1) the name

of each timekeeper in my firm who devoted more than 20 hours to the case; (2) their title or position (e.g, member, associate, paralegal); (3) the total number of hours they worked on the case from its inception through and including August 17, 2023; (4) their current hourly rate; (5) their rate according to the Fitzpatrick Matrix; (6) their lodestar (at their current rates); and (7) their lodestar using the Fitzpatrick rates:

Name	Title	Total Hours	Current Rate	Total Lodestar	Fitzpatrick Rate	Fitzpatrick Lodestar
Narwold, William	Member	714.75	$1,250	$893,437.50	$807	$576,803.25
Oliver, Meghan	Member	570.45	$950	$541,927.50	$726	$414,146.70
Tinkler, William	Associate	139.15	$550	$76,532.50	$664	$92,395.60
Loper, Charlotte	Associate	348.40	$525	$182,910.00	$536	$186,742.40
Bobbitt, Ebony	Associate	86.90	$525	$45,622.50	$520	$45,188.00
Rublee, Laura	Staff Attorney	184.20	$500	$92,100.00	$807	$148,649.40
Janelle, Alice	Legal Secretary	48.60	$380	$18,468.00	$220	$10,692.00
Shaarda, Lynn	Paralegal	27.40	$350	$9,590.00	$220	$6,028.00
TOTAL				$1,847,830.50		$1,480,645.35

3. In addition to this lodestar, at the time that we filed the Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards we also estimated $500,000 for Motley Rice's projected future work. The reasonableness of that conservative estimate has only been further confirmed since we filed the motion. Motley Rice has already incurred more than $60,000 worth of additional lodestar since filing the motion, even when calculated using Fitzpatrick Matrix rates. Since filing, we have spent additional time responding to class-member inquiries (*e.g., When can I expect to receive a check? Am I a class member? I've moved several*

times; how will I get my check? Etc.). Since we sent notice of the settlement this summer, Motley Rice has responded to roughly 300 email inquiries and calls from class members, many of which included multiple contacts with the individuals, and contacts to KCC.[1] We expect to continue to receive inquiries from class members over the coming months.

4. Since the payment notification functionality went live on the website, we have received over 800 payment notifications, including over 460 notifications from individuals that someone else paid on their behalf, and over 400 notifications from individuals or entities that they paid someone else's PACER fees ("payer notifications"). We have not yet processed those notifications, but are pleased that we have not received any disputes in response to payer notifications submitted. In the coming weeks and months we will work with KCC to process those notifications.

5. Since filing our final approval motion, we have continued to address data issues, including most recently, conferring with the government on discrepancies between the data provided by the government in 2017 and the data provided by the government in 2023. We expect there are likely to be additional data issues and questions as notifications are processed, and KCC begins to calculate settlement shares and issue checks. Based on our experience with past class-action settlements, we also expect to see a substantial uptick in class-member contacts after checks are issued.

[1] My initial declaration relied on a dated version of KCC's not-to-exceed estimate, and incorrectly stated that KCC's original not-to-exceed estimate was $977,000. ECF 158-6. The correct estimate should have been $1,002,000. That number now has been revised further based on unforeseen data complexities and administration issues. *See* Declaration of Gio Santiago at ¶ 4 (Oct. 2, 2023).

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed in Mount Pleasant, SC, on October 3, 2023. */s/ Meghan S.B. Oliver*
Meghan S. B. Oliver

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-PLF

PLAINTIFFS' NOTICE OF FILING OF ALL OBJECTIONS RECEIVED TO DATE

On the eve of the fairness hearing, Objector Eric Alan Isaacson has filed a seven-page "written statement" with several new procedural objections to the final-approval process. Among other things, he complains that documents—including the Court's orders, the plaintiffs' reply and supporting material, and others' objections—were "not served on [him] by the Court or by any party." But the Court's orders and the reply are available on the public docket, are posted (for free) on the PACER Fees Class Action website, and were emailed via CM-ECF to anyone who filed a notice of appearance. To ensure full transparency, this notice attaches all objections of which the settling parties have been made aware, timely or untimely, filed by the following individuals: Aaron Greenspan, Alexander Jiggets, Geoffrey Miller, Don Kozich, and Eric Alan Isaacson. To ensure free access, each objection is also being posted on the PACER Fees Class Action website.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER LLP
2001 K Street, NW, Suite 850 North

Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

WILLIAM H. NARWOLD
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

MEGHAN S.B. OLIVER
CHARLOTTE E. LOPER
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

October 11, 2023

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2023, I electronically filed this notice through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Deepak Gupta
Deepak Gupta

Gupta / Wessler

Deepak Gupta <deepak@guptawessler.com>

Objection to PACER Class Action Settlement

Aaron Greenspan <aarong@thinkcomputer.com> Thu, Sep 14, 2023 at 12:33 AM
To: DCD_PACERFeesSettlement@dcd.uscourts.gov
Cc: Deepak Gupta <deepak@guptawessler.com>, Brenda Gonzalez Horowitz <brenda.gonzalez.horowitz@usdoj.gov>

Civil Action No. 16-745-PLF: Objection to Proposed Settlement in National Veterans Legal Services Program, et al. v. United States of America

To The Parties and the Court:

I hereby object to the class-action settlement on behalf of myself as an individual, Think Computer Corporation, and the now closed Think Computer Foundation (the "Think entities"). I realize that I am a day late (as it is still September 13th here in California where I am writing from). I apologize. I'd point out that the Court and the parties took something on the order of seven years to reach this point in the litigation, and then gave barely any notice to object to the proposed settlement. Then you scheduled your deadline three days **before** the corporate tax deadline of September 15th for those with an extension. Three days after would have been much easier to comply with.

Through my company, I run PlainSite (https://www.plainsite.org). PlainSite hosts over 15 million federal and state legal dockets, as well as various other government materials. Not every document that should be available is—because of the unlawful PACER fee structure, which somehow still persists today even as the courts have acknowledged its unlawfulness and pledged to move away from it at some unspecified date, which at this rate will likely outlast my lifetime.

As referenced in ECF No. 158-5 at 3 (paragraph 8), which I only became aware of this evening, I was the plaintiff in one of the only lawsuits—if not the only lawsuit—to ever challenge the PACER fee structure, prior to this one. Generally, my objection to the settlement in this action is that I and the Think entities, which have each amassed significant PACER fees over the years in order to serve the public (see https://www.plainsite.org/about/jointventure.html), should not have had to pay a single penny to the federal government for fees that were unlawfully charged in the first place. Accordingly, all of that money should be refunded in full, and the Administrative Office of the United States Courts should reimburse class counsel's attorney's fees and costs separately from any settlement fund.

I am not naive. I realize that different statutes authorize various types of relief, subject to certain limits, etc. I realize that the Little Tucker Act has a $10,000 statutory limit.

I don't care. Not because I don't care about the rule of law, but because I am incensed.

For years the judiciary has scammed the American public with this obscene scheme, and that is separate and apart from the fact that the judiciary is presently controlled by partisan hacks who wear robes for a living, as recently proven beyond a shadow of a doubt by ProPublica's investigative reporting. See https://www.propublica.org/topics/courts. Put simply, it is clearer than ever that the courts and the Judicial Conference are run by corrupt judges. That's "judges," plural, starting with the Chief Justice. See https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html. To insist (for years) on various legal limitations and restrictions when victims of the judiciary's elaborate scam seek relief (and to be clear, this is not the only or even the largest elaborate scam perpetrated on the public by the courts)—but to have tossed all of that aside as the judiciary carried out the scam for years under the color of law in the first place—is manifestly unjust. Surely, the parties want to move on and counsel would like to proceed onward to more exciting cases. I'm sorry, but none of that matters to me. I want my money—stolen by the courts—back. All of it. And I want the Administrative Office staff and the judges who approved this held accountable, by name, starting with Michel Ishakian.

After more than a decade of observing our justice system through PlainSite, I have lost track of the number of cases where judges, sadly having little to no understanding of modern technology, have made the wrong decision because they were not properly informed and frankly didn't care to be. This case is no different. The settlement here ignores the fundamental fact, which did arise in the plaintiffs' briefing, that the marginal cost of document transmission for PACER is **zero**. By zero, I mean $0.00. Whatever up-front costs CM/ECF and PACER required to develop, those were fully funded ages ago. The E-Government Act of 2002 specifically mandates that the courts cannot charge beyond their marginal cost, and since their marginal cost is zero, that means **they cannot charge**. As I recall, Senator Lieberman even weighed in himself to say so. Yet this went ignored.

I will not belabor this point further, especially since I fear that my objection will not even be considered. Suffice it to say that the plaintiffs are 100% right, the government is 100% wrong, and a settlement that takes $23 million, or any amount,

out of the victims' pool for attorney's fees, when the courts themselves are behind a scam of this magnitude, is completely unjust. PACER, to this day, continues to charge $0.10 per page for error messages. It continues to charge for judicial opinions that have been improperly coded (which is most of them). Any judge who has had anything to do with approving this outrage should be required to pay victims out of their government salaries personally, judicial immunity be damned.

I see what you are all doing, I see what you have done, and I do not approve. I object.

Aaron Greenspan
San Francisco, California

Think

Aaron Greenspan
President & CEO
Think Computer Corporation

telephone +1 415 670 9350
fax +1 415 373 3959
e-mail aarong@thinkcomputer.com
web http://www.thinkcomputer.com

From: ALEXANDER JIGGETTS
To: DCD PACER Fees Settlement
Subject: Oppose settlement
Date: Tuesday, September 26, 2023 11:04:15 PM

CAUTION - EXTERNAL:

I Alexander Jiggetts oppose the settlement for I am the first person to complain about Pacer Fees and I petitioned in the United States District Court for Maryland and with the Administrative office of the courts about overcharging persons for Pacer and it should be with not a fee I should at least get one million for telling what is going on these attorneys who are getting at least $25,000,000 million took over what I was doing and wanted to give me $350 so I told them.not to email me or call me I represent myself in this issue and I did not enter into a client privilege with them so they just want make cash and be in everyone's business.
Please email me about this matter.
With much respect to this court they just want to have access to my 137 cases that I filed and have rights to my cases with not paying for my name and likeness I did business with the United States government when I was going through some rough things I did not do business with these attorneys abd corporations that download the cases and sell them for billions with not asking the persons who filed the cases and name and likeness they use do they want any compensation that is all they want is to sell persons cases that is what they want I have warned companies about selling persons cases and not giving them nothing a cases is mot for profit when someone uses it is to a note when filing a case but these attorneys and business sell persons cases to billionaires while the lower case get nothing.
I oppose the settlement because I need something for what I done.
Also those attorneys assigned to the case are harrassers.
Alexander Jiggetts
Jiggettsalexander@aol.com
410-596-8404
9/26/2023

CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

Geoffrey Miller
216 SE Atlantic Drive
Lantana, Florida 33462-1902
917-575-5656
geoffreypmiller@gmail.com

August 8, 2023

Honorable Paul L. Friedman
United States District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, D.C. 20001
DCD_PACERFeesSettlement@dcd.uscourts.gov

In re: Civil Action No. 16-745-PLF: Objection to Proposed Settlement in National Veterans Legal Services Program, et. al. v. United States of America

Dear Judge Friedman:

I am a member of the class in the above-referenced action (Account ID 1033281). I write to object to the proposed settlement.

I have no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for attorney fees, expenses, representative plaintiff awards and claims administration. I do object, however, to the proposed plan of allocation.

As I understand it, each class member will receive a minimum payment from the net settlement fund equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. The remainder of the fund will be allocated pro rata to class members who paid more than $350 in PACER fees.

This formula for distribution discriminates between two subparts of the class otherwise identically situated: class members who paid $350 or less in PACER fees and class members who paid more than $350 in fees. The former will receive the full amount of the fees; the latter will receive some (presumably significantly lower) percentage of their fees.

This discrimination between larger and smaller claimants cannot be justified on grounds of administrative necessity. In other cases, processing of small claims can be infeasible because of the administrative costs of making small distributions. This is not the case here because the

settlement contemplates that small claimants will be paid in full – even if they have only a few dollars or pennies in charges.

Nor can the discrimination be justified on the ground that small claimants are unlikely to file claim forms. As I understand this settlement, claim forms will not be required because the defendant has the necessary information on class members and the amounts of their claims.

The rationale for discriminating between larger and smaller claims seems based, rather, on a wish to favor smaller users or a sense of what is likely to receive a positive reception in the public eye. Neither of these is a valid basis for favoring one set of litigants over another when both are identically situated in all respects other than the size of their claims.

The class action is designed to conserve on litigation costs and provide access to justice for people with small claims. The proposed plan of allocation has nothing to do with these objectives because all class members have received access to justice and a more equal plan of distribution would have no impact on litigation costs.

Plaintiffs' counsel faced a conflict of interest as soon as they began to negotiate a settlement that discriminated between class members based on the size of their claims. Interclass conflicts can be tolerated when there are valid reasons for proceeding – but here it appears that there was no reason to structure the settlement this way other than an intention to distribute the benefits of the settlement on a basis other than legal entitlement. Redistribution of wealth may be admirable from an ethical perspective, but is not a valid reason for the court to approve a settlement that invidiously discriminates between class members otherwise identically situated.

The proposed plan of allocation under Federal Rule 23 is in tension with the Rules Enabling Act, 28 U.S.C. § 2071-2077, because, by providing different treatment to litigants with identical legal claims, it arguably abridges their right to be treated equally before the law.

I do not know the size of the overcharges I have incurred through my use of PACER during the class period, and therefore do not know whether I am in the favored or disfavored part of the class. Even if I fall in the favored category, I believe I have standing to object to the settlement. Rule 23(e)(5)(A) provides that "*any class member* may object to the proposal if it requires court approval under this subdivision (e)." There is no requirement that a class member must be harmed by the provision of a settlement to which the class member objects. If there were such a bar, and if I fall in the favored group, then I request that this objection be treated as that of a friend of the court.

In light of the foregoing, I request that this Court consider sending the proposed settlement back to the parties with instructions to work towards a negotiated resolution that does not invidiously discriminate between larger and smaller claimants.

Sincerely,

Geoffrey Miller

Cc: Gupta Wessler PLLC
2001 K Street, N.W.
Suite 850 North
Washington, D.C. 20006
deepak@guptawessler.com

Derek Hammond
Assistant United States Attorney
601 D Street, N.W.
Washington, D.C. 20530
Derek.Hammond@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM , et al

Plaintiffs

v.

UNITED STATES OF AMERICA

Defendant(s)

CASE NO. 1:16-cv-00745-PLF
J: Paul L. Friedman

DON KOZICH, Individually
Plaintiff-Class Member,
v.
UNITED STATES OF AMERICA
Defendant(s)

PLAINTIFF-CLASS MEMBER DON KOZICH'S VERIFIED OBJECTIONS TO SETTLEMENT AND MOTION TO APPEAR TELEPHONICALLY OR BY ZOOM

Pursuant to Fed.R.Civ.P. 24 and LCvR 7(j), and 28 USC § 1331 and 1346(a), the Plaintiff-Class Member Don Kozich submits his Verified Objections to Settlement and Motion to Appear Telephonically or by ZOOM, and under penalty of perjury, declares that he has read the Motion, and that the facts stated in it are true, and in support of this motion states,

I. KOZICH'S EXHIBITS (Exhibit "____")

For this Verified Motion, Kozich relies on the attached Exhibits.

II. STANDING

The complaint and any pending settlement are limited in scope and appear to address only some but not all of those PACER users who have **paid** excessive PACER user fees but do not address all of those PACER users who have paid excessive PACER fees or those PACER users who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into illegal collection, or all.

Kozich is before this court because he is a Class Member but is not listed as a class member by the Defendant because the Defendant with its blinders on purposely never listed Kozich as a class member because the Defendant allegedly could not find where Kozich ever paid PACER fees (Exhibit "D", pg 8). But Kozich paid PACER fees (Exhibit "A"). Kozich believes the Defendant purposely never listed Kozich as a class member that paid excessive PACER fees because doing so would open a Pandora's box and makes the Defendant liable for untold additional millions of dollars in excessive fees that unidentified class members have paid.

Additionally besides paying excessive PACER fees for copy costs, Kozich also paid excessive fees in searching Federal Cases outside of the Southern District of Florida. PACER charged Kozich excessive fees because he was searching cases throughout the country, i.e. Washington, Oregon, California, etc., having to do with federally subsidized Low Income Housing Tax Credit (LIHTC) apartment communities.

For the quarter FY 2010 PACER had a Net Profit of $26,611,517 (Exhibit E) and for the period 4/21/10-5/31/18 (a total of 37 quarters) had a Net Profit of $984,626.129 (37 X $26,611,517). The Settlement of $125,000,000 is a mere drop in the bucket compared to PACER's $981,626,120 net profit for charging excessive user fees. Moreover, with the $125,000,000 Settlement the Defendant just received a slap on the wrist. The compound interest alone on the $984,626,129 in net profits received by PACER for charging excessive user fees that the Defendant earned far exceed the $125,000,000 settlement.

As it now stands the $125,000,000 Settlement is one-sided. It is refunding only those persons who paid more than $350 in excessive PACER fees but is not paying those persons who paid less than $350 in excessive PACER fees. The settlement only benefits the large corporations, large law offices and large non-profits that spent large amounts paying excessive PACER fees but does nothing for the small or medium size corporation, law firm or non-profit. The old bur still true adage comes into play, "Large Corporations control the world." i.e. Microsoft, Monsanto, Apple, Amazon, eBay, etc. Kozich has not seen an accounting of how much money the Defendant should refund to persons who paid less than $350 in excessive PACER fees or for that matter what is the time frame or quarters that the Defendant has been charging excessive PACER fees. Kozich is certain the time frame far exceeds 37 quarters.

The Settlement should be much higher to include those who paid less than $350 in excessive Pacer fees and to act as a deterrent and the Defendant should be paying

interest and penalties for knowingly charging excessive fees which monies should go to the users. Otherwise the Defendant will knowingly just continue to charge excessive user fees.

Therefore, Kozich has standing to object to the settlement as Plaintiff and a Class Member in this case.

III. RELIEF SOUGHT

Kozich is before this court as a Limited Class Member and Amicus:

a. As a class member because he utilized PACER and paid excessive PACER user fees (Exhibit "A").

b. As a limited class member because PACER closed Kozich's account and put it into collection because he had an outstanding balance of $354.60 plus $94.26 in illegal collection fees for a total of $448.86 (Exhibit "B") owed to PACER resulting from PACER overcharging excessive fees, and not allowing free looks and copy and paste to pro se persons while allowing attorneys free looks and free copy and paste.

A. Pursuant to LCvR 7(o):

1. **The Nature of Kozich's interest:** The complaint and any pending settlement are limited in scope and appear to **address only some but not all** of those PACER users who paid PACER excessive user fees but do not address **all** of those PACER users who have paid excessive PACER user fees or have **not** paid or are delinquent in the payment of excessive user

fees or have been cut-off from utilizing PACER and their account put into collection, or all.

2. **Reason(s) Why Kozich's And Similarly Situated Persons' Position are Not Adequately Represented by a Party:** The complaint and any pending settlement are limited in scope and appear to **address only some but not all** of those PACER users who paid excessive PACER user fees and do not address those PACER users who have **not** paid or are delinquent in the payment of excessive PACER user fees or have been cut-off from utilizing PACER and their account put into collection, or all
3. **Reason(s) Why the Matters Asserted Are Relevant to the Disposition of the Case:** The case cannot be fully and fairly adjudicated without including those PACER users who have paid and those who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into collection, or all
4. **Statement of Position of Each Party As to the Amicus:** All parties are opposed to the Amicus. The Plaintiffs because it requires the Plaintiffs to open the class to PACER users who have paid and those who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into collection, or all. The Defendant naturally because opening the class to include users who have paid and those who have **not** paid the excessive PACER user fees opens

the Defendant to higher damages.

B. Motion to Appear Telephonically or by ZOOM:

1. Kozich is before this court pro se and IFP, and resides in Fort Lauderdale, FL.
2. Kozich requests telephonic appearance or ZOOM to explain, clarify and answer any questions that the court may have regarding the facts and circumstance surrounding PACER fees.

C. Motion to Deem date of Service to be Date of Filing:

Because he does not have access to ECF, Kozich also requests that with all of his filings, that the court deem the date of service to be the date of filling.

IV. ARGUMENT

The complaint and any pending settlement are limited in scope and appear to address only some but not all of those PACER users who have **paid** excessive PACER user fees but do not address all of those PACER users who have paid excessive PACER fees or those PACER users who have **not** paid or are delinquent in the payment of excessive user fees or have been cut-off from utilizing PACER and their account put into illegal collection, or all.

For the quarter FY 2010 PACER had a Net Profit of $26,611,517 (Exhibit E) and for the period 4/21/10-5/31/18 (a total of 37 quarters) had a Net Profit of $984,626.129 (37 X $26,611,517). The Settlement of $125,000,000 is a mere drop in the bucket compared to PACER's $981,626,120 net profit for charging excessive user

fees. Moreover, with the $125,000,000 Settlement the Defendant just received a slap on the wrist. The compound interest alone on the $984,626,129 in net profits received by PACER for charging excessive user fees that the Defendant earned far exceed the $125,000,000 settlement.

As it now stands the $125,000,000 Settlement is one-sided. It is refunding only those persons who paid more than $350 in excessive PACER fees but is not paying those persons who paid less than $350 in excessive PACER fees. The settlement only benefits the large corporations, large law offices and large non-profits that spent large amounts paying excessive PACER fees but does nothing for the small or medium size corporation, law firm or non-profit. The old bur still true adage comes into play, "Large Corporations control the world." i.e. Microsoft, Monsanto, Apple, Amazon, eBay, etc. Kozich has not seen an accounting of how much money the Defendant should refund to persons who paid less than $350 in excessive PACER fees or for that matter what is the time frame or quarters that the Defendant has been charging excessive PACER fees. Kozich is certain that the time frame for PACER charging excessive fees far exceeds 37 quarters.

The Settlement should be much higher to include those who paid less than $350 in PACER excessive fees and to act as a deterrent and the Defendant should be paying interest and penalties for knowingly charging excessive fees which monies should go to the users. Otherwise the Defendant will knowingly just continue to charge excessive user fees.

Kozich also objects to the settlement because the Defendant has purposely not included as a class member or disclosed all persons, such as Kozich, who paid excessive PACER fees so as to evade reimbursing millions of dollars in excessive PACER fees.

Motley Rice LLC relied on the Defendant to identify Class Members which is like having a fox watch the henhouse. Naturally the Defendant is going to minimize its liability and provide a list of Class Members that will produce the least amount of liability.

Kozich requests the Court deny or set aside the settlement, reopen the case and require that the Defendant include as a class member and disclose all persons, including Kozich, who paid excessive PACER fees and disclose the total amount that PACER charged in excessive fees and the time frame or quarters that it charged excessive fees. .

PRESERVATION OF CLAIMS, DEFENSES, COUNTERCLAIMS AND RESERVATION OF RIGHTS

With the filing of this Motion, Kozich does not waive any claims, defenses or counterclaims which may be available to him and reserves all rights and privileges available to him.

V. CONCLUSION

WHEREFORE, Kozich respectfully requests an order of court,

1. Granting his Verified Objection to the Settlement, deny or set aside the settlement, reopen the case and require that the Defendant disclose all persons, including Kozich, who paid PACER excessive fees and disclose the total amount it charged in excessive fees and the time frame or quarters that PACER charged excessive fees.

2. That the court deem the date of service of Kozich's papers to be the date of filling.

3. That the court grant Kozich's Motion to Appear telephonically or by ZOOM.

4. Or such further and other relief deemed just and equitable.

VERIFICATION DECLARATION

I DECLARE under penalty of perjury that the statements made in this motion are true and correct to the best of my knowledge.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member

I HEREBY CERTIFY that the foregoing was filed with the court on 10/6/23.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member
PO Box 2032
Fort Lauderdale, FL 33303
954.709.0537
dtkctr@gmail.com

Case Administrator
202.354.3174
202.354.3190

dcd_intake@dcd.uscourts.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel or parties of record in accordance with the Service List attached.

/S/ Don Kozich
Don Kozich, Plaintiff-Class Member

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $38.80 was received at the PACER Service Center on 08/08/2009 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

---

[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

Ex A 1/3

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $13.36 was received at the PACER Service Center on 10/29/2009 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

---

[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

David R. Stone
Chief, PACER Support Branch

(800) 676-6856
FAX: (210) 301-6441

PACER SERVICE CENTER
P.O. Box 780549
San Antonio, TX 78278-0549

01/25/2023

To: Don Kozich
Don Kozich
Pob 2032
Ft. Lauderdale, FL 33303

Account number: 2792766

Subject: Receipt of Payment

This letter is to confirm that payment in the amount of $21.92 was received at the PACER Service Center on 02/04/2010 and applied to account 2792766.

Thank you for making a payment on this account[1]. If you have any questions, please call the PACER Service Center at (800) 676-6856 and a representative will assist you.

Thank you,

PACER Service Center

---

[1]Per the *Guide to Judiciary Policies and Procedures* Chapter VII Part C.Para 2.1.8; "...the receipt of an instrument other than cash does not itself discharge the payer's debt or obligation to pay. Only when the instrument has been cleared by the depositary is payment actually complete. Therefore, checks or instruments which are rejected or returned unpaid by the depository will require certain action by the court." Additional fees may also apply.

Ex A
3/3

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 10/07/2015
Usage From: 07/01/2015 to: 09/30/2015

Account Summary

Pages:	1,803
Rate:	$0.10
Subtotal:	$180.30
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$180.30
Previous Balance:	$174.30
Current Balance:	**$354.60**

Total Amount Due: → $354.60

Account #:	2792766
Invoice #:	2792766-Q32015
Due Date:	11/09/2015
Amount Due:	$354.60

NextGen CM/ECF

In August, the Kansas District and Alaska Bankruptcy courts implemented the next generation (NextGen) CM/ECF system. Throughout fall 2015, several other courts plan to convert to the new system. monitor your court's website for additional information. To learn more about NextGen CM/ECF, and how it may affect you and your firm/office, visit the NextGen information page at pacer.gov/nextgen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
2792766	11/09/2015	$354.60

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

Visit pacer.gov for address changes.

Don Kozich
Don Kozich
619 No. Andrews Avenue, #408
Ft. Lauderdale, FL 33311

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

Ex B 1/1

Gmail

don kozich <dtkctr@gmail.com>

PACER Fees Class Action

2 messages

Rublee, Laura <lrublee@motleyrice.com> Mon, Sep 11, 2023 at 3:37 PM
To: "dtkctr@gmail.com" <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich,

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Information about the settlement, as well as a link to the email address I just provided, can be found at https://www.pacerfeesclassaction.com/Home.aspx. As I explained, class members do not have to file a claim. If the Court approves the proposed Settlement and Plan of Allocation, checks will be automatically sent to class members based on PACER billing records of the Administrative Office of the United States Courts.

As we discussed, we cannot help you with your individual complaint that PACER cut off access to your account for non-payment or with reopening your PACER account. The class action focused only on the excessiveness of the fees, which is the difference in the amount of the fees collected and the actual cost of running the PACER system, that affected all class members, i.e., those who paid PACER fees during the class period.

Regards,

Laura Rublee

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

MotleyRice
ATTORNEYS AT LAW

Exc 1/3

Confidential & Privileged

Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

---

don kozich <dtkctr@gmail.com> Mon, Sep 11, 2023 at 9:50 PM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

--------- Forwarded message ---------

From: **Rublee, Laura** <lrublee@motleyrice.com>
Date: Mon, Sep 11, 2023 at 3:37 PM
Subject: PACER Fees Class Action
To: dtkctr@gmail.com <dtkctr@gmail.com>

Mr. Kozich,

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Information about the settlement, as well as a link to the email address I just provided, can be found at https://www.pacerfeesclassaction.com/Home.aspx. As I explained, class members do not have to file a claim. If the Court approves the proposed Settlement and Plan of Allocation, checks will be automatically sent to class members based on PACER billing records of the Administrative Office of the United States Courts.

As we discussed, we cannot help you with your individual complaint that PACER cut off access to your account for non-payment or with reopening your PACER account. The class action focused only on the excessiveness of the fees, which is the difference in the amount of the fees collected and the actual cost of running the PACER system, that affected all class members, i.e., those who paid PACER fees during the class period.

Regards,

Laura Rublee

Laura Rublee Attorney at Law
28 Bridgeside Blvd., Mt. Pleasant, SC 29464
o. 843.216.9192
lrublee@motleyrice.com

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phine number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

[Quoted text hidden]

3 attachments

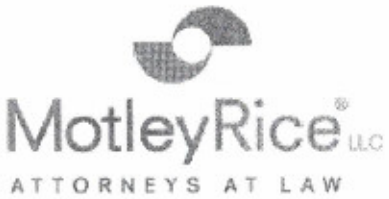


image001.png
5K

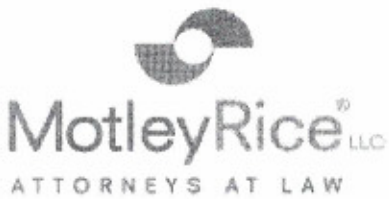


image001.png
5K

230911 PACER FEES $354.60 TO MOTLEY-RICE.pdf
215K

Exc 2/3

Gmail

don kozich <dtkctr@gmail.com>

PACER ACCOUNT

12 messages

don kozich <dtkctr@gmail.com> Mon, Sep 11, 2023 at 9:55 PM
To: pacerlitigation@motleyrice.com

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phone number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

230911 PACER FEES $354.60 TO MOTLEY-RICE.pdf
215K

Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 14, 2023 at 9:55 AM
To: don kozich <dtkctr@gmail.com>, PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

I received your voicemail this morning and am following up. I had forwarded your information to the claims administrator. They searched by name, address and account number, but you are not showing up in the data as a member of the class.

Please let me know if you have any additional questions.

Regards,

Laura Rublee

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

Ex B
1/12

MotleyRice
ATTORNEYS AT LAW

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Monday, September 11, 2023 9:56 PM
To: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: PACER ACCOUNT

CAUTION:EXTERNAL

[Quoted text hidden]

Confidential & Privileged

Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

don kozich <dtkctr@gmail.com> Thu, Sep 14, 2023 at 10:14 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura,
Why am I not showing up as a member of the class?
I paid PACER previous billings.
I want to submit a claim. How do I accomplish submitting a claim?
Please let me know what you find out.
Thanks
Don Kozich

[Quoted text hidden]

Ex D 2/12

2 attachments

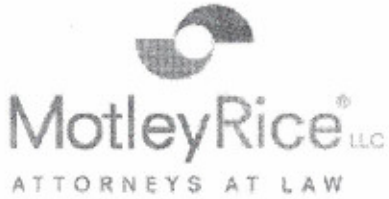


image001.png
5K

image001.png
5K

Rublee, Laura <lrublee@motleyrice.com> Fri, Sep 15, 2023 at 5:02 PM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

I wanted to let you know that we are following up with the administrator and we will get back to you as soon as possible.

Regards,

Laura

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

Ex D 3/12

From: don kozich <dtkctr@gmail.com>
Sent: Thursday, September 14, 2023 10:15 AM
To: Rublee, Laura <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: Re: PACER ACCOUNT

CAUTION:EXTERNAL

[Quoted text hidden]
[Quoted text hidden]

Rublee, Laura <lrublee@motleyrice.com> Tue, Sep 19, 2023 at 11:35 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Zorich,

We are continuing to look into this matter, but hope that you can provide us with some additional information about your PACER account history. Can you call me at your earliest convenience? My direct number is 843-216-9192.

Thank you.

[Quoted text hidden]
[Quoted text hidden]

Rublee, Laura <lrublee@motleyrice.com> Tue, Sep 19, 2023 at 11:50 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich, I am so sorry that I misspelled your name! In any event, I would appreciate a call.

[Quoted text hidden]
[Quoted text hidden]

---

don kozich <dtkctr@gmail.com> Fri, Sep 22, 2023 at 7:04 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura,
What is the status of your checking on my account and payment with PACER?
Thanks
Don Kozich
[Quoted text hidden]

Ex. D
4/12

4 attachments

image001.png
5K

image001.png
5K

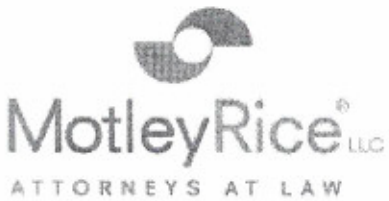


image001.png
5K

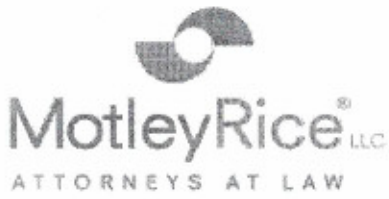


image001.png
5K

Rublee, Laura <lrublee@motleyrice.com> Fri, Sep 22, 2023 at 8:38 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

We are still looking into your account and why you are not included in the class member data, but we must work with the government to get answers to your questions and, unfortunately, getting answers will take some time.

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

Ex D 5/12

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Monday, September 11, 2023 9:56 PM
To: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: PACER ACCOUNT

CAUTION:EXTERNAL

Thank you for speaking with me today. I understand that you have not received a notice of the settlement of this matter. If you would like the claims administrator to check to see if you are a member of the class, please send your PACER account number and the associated email address to pacerlitigation@motleyrice.com. It would also be useful to include the mailing addresses, both current and present.

Please see attached for my PACER billing.
My current mail address is: POB 2032, Fort Lauderdale, FL 33303
My current residence address is: 4537 Poinciana St., Fort Lauderdale, FL 33308
My phone number is: 9547090537
My email address is: dtkctr@gmail.com
I appreciate your prompt attention to this matter.
Thanks
Don Kozich

E.D 6/12

Confidential & Privileged

Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

Confidential & Privileged

Unless otherwise indicated or obvious from its nature, the information contained in this communication is attorney-client privileged and confidential information/work product. This communication is intended for the use of the individual or entity named above. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies--electronic, paper or otherwise--which you may have of this communication.

[Quoted text hidden]

---

don kozich <dtkctr@gmail.com> Thu, Sep 28, 2023 at 8:10 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura,
What is the status of your checking on my account and payment with PACER?
Do I need to file my objection to the settlement?
Thanks
Don Kozich
[Quoted text hidden]

---

2 attachments

MotleyRice LLC
ATTORNEYS AT LAW

image001.png
5K

MotleyRice LLC
ATTORNEYS AT LAW

image001.png
5K

Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 28, 2023 at 9:15 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Dear Mr. Kozich,

7/12

We have heard from the government after asking about your account. We were concerned because you had received notice of the class action in 2017, but you were not in the 2023 class member data. The data provided by the government used for sending notices in 2017 had been pulled from the government's billing records using "billed amount" as a parameter. Not all those who received a notice of this class action in 2017 had actually paid PACER fees; they had just been billed for PACER fees. The 2023 data, on the other hand, were pulled from the billing records using "paid amount" as a parameter, so only those who had paid PACER fees were included in that data. As you are aware, class members are those who actually paid PACER fees during the class period. The claims administrator could not locate you in the 2023 data because you had not actually paid PACER fees during the class period. This also explains why you had not received notice of the settlement.

Please let me know if you have any questions.

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: Rublee, Laura <lrublee@motleyrice.com>
Sent: Tuesday, September 19, 2023 11:36 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: RE: PACER ACCOUNT

Dear Mr. Zonich,

We are continuing to look into this matter, but hope that you can provide us with some additional information about your PACER account history. Can you call me at your earliest convenience? My direct number is 843-216-9192.

Thank you.

Laura

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: Rublee, Laura <lrublee@motleyrice.com>
Sent: Friday, September 15, 2023 5:02 PM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: RE: PACER ACCOUNT

Dear Mr. Kozich,

I wanted to let you know that we are following up with the administrator and we will get back to you as soon as possible.

Regards,

Laura

Ex D 9/12

Laura Rublee Attorney at Law

[Quoted text hidden]

o. 843.216.9192

lrublee@motleyrice.com

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

---

don kozich <dtkctr@gmail.com> Thu, Sep 28, 2023 at 10:04 AM
To: "Rublee, Laura" <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Laura
The government is wrong, I paid PACER fees.
Therefore I will file my objections to the settlement.
Please provide the name and address of the court to where I file my objections and the email address of all persons to be served?
Thanks
Don Kozich

[Quoted text hidden]

---

2 attachments

MotleyRice LLC
ATTORNEYS AT LAW

image001.png
5K

image001.png
5K

EvD 10/12

MotleyRice LLC
ATTORNEYS AT LAW

Rublee, Laura <lrublee@motleyrice.com> Thu, Sep 28, 2023 at 10:24 AM
To: don kozich <dtkctr@gmail.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>

Mr. Kozich,

Please see the attached notice of the settlement which contains the information you have requested.

Laura

MotleyRice LLC
ATTORNEYS AT LAW

Laura Rublee Attorney at Law

28 Bridgeside Blvd., Mt. Pleasant, SC 29464

o. 843.216.9192

lrublee@motleyrice.com

From: don kozich <dtkctr@gmail.com>
Sent: Thursday, September 28, 2023 10:05 AM
To: Rublee, Laura <lrublee@motleyrice.com>
Cc: PACER Litigation <pacerlitigation@motleyrice.com>
Subject: Re: PACER ACCOUNT

Ex D
11 h 2

CAUTION:EXTERNAL

Laura

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

Laura Rublee Attorney at Law

[Quoted text hidden]

o. 843.216.9192

lrublee@motleyrice.com

[Quoted text hidden]
[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

PACER Fees Class Action Notice.pdf
191K

Ex D
12/12

Public Access and Records Management Division

AVAILABLE RESOURCES:

Summary of Resources QTRLY Rprt

		FY 2010 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 34,381,874
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 102,511,199
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 516,534
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 187,118
5	**Total Available Resources**	**$ 137,596,725**
6	***PROGRAM REQUIREMENTS:***	
7	**Public Access Services and Applications**	
8	EPA Program (OXEEPAX)	$ 18,768,552
9	EPA Technology Infrastructure & Applications (OXEPTAX)	$ -
10	EPA Replication (OXEPARX)	$ -
11	**Public Access Services and Applications**	$ 18,768,552
12	**Case Management/Electronic Case Files System**	
13	Development and Implementation (OXEECFP)	$ 3,695,078
14	Operations and Maintenance (OXEECFO)	$ 15,536,212
15	CM/ECF Futures (OXECMFD)	$ 3,211,403
16	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$ 144,749
17	District Operational Forum (OXEDCAX)	$ 674,729
18	Bankruptcy Operational Forum (OXEBCAX)	$ 492,912
19	**Subtotal, Case Management/Electronic Case Files System**	**$ 23,755,083**
20	**Electronic Bankruptcy Noticing:**	
21	Electronic Bankruptcy Noticing (OXEBNCO)	$ 9,662,400
22	**Subtotal, Electronic Bankruptcy Noticing**	**$ 9,662,400**
23	**Telecommunications (PACER-Net & DCN)**	
24	PACER-Net (OXENETV)	$ 10,337,076
25	DCN and Security Services (OXENETV)	$ 13,847,748
26	PACER-Net & DCN (OXDPANV)	$ -

Ex E 1 1/2

Dockets.Justia.com

27	Security Services (OXDSECV)	$ -
28	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$ 24,184,824**
29	**Court Allotments**	
30	Court Staffing Additives(OXEEPAA)	$ 228,373
31	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$ 1,291,335
32	CM/ECF Court Allotments (OXEECFA)	$ 7,605,585
33	Courts/AO Exchange Program (OXEXCEX)	$ 303,527
34	**Subtotal, Court Allotments**	**$ 9,428,820**
35	**Total Program Requirements**	**$ 85,799,679**
36	***Congressional Priorities:***	
37	**Victim Notification (Violent Crime Control Act)**	
38	Violent Crime Control Act Notification (OXJVCCD & OXJVCCO)	$ 332,876
39	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$ 332,876**
40	**Web-based Juror Services**	
41	Web Based E-Juror Services O&M (OXEJMEO)	$ -
42	**Subtotal, Web-based Juror Services**	**$ -**
43	**Courtroom Technology (OXHCRTO-3000)**	
44	Courtroom Technology (OXHCRTO-3000)	$ 24,731,665
45	**Subtotal, Courtroom Technology Program**	**$ 24,731,665**
46	**State of Mississippi (OXEMSPX)**	
47	State of Mississippi (OXEMSPX)	$ 120,988
48	**Subtotal, Mississippi State Courts**	**$ 120,988**
49	**Total Congressional Priorities**	**$ 25,185,529**
50	**Total Program & Congressional Priorities**	$ 110,985,208
51	**Total EPA Carry Forward (Revenue less Disbursement)**	**$ 26,611,517**
52	PACER FEE (OXEEPAC) Carry Forward	$ 26,051,473
53	PRINT FEE (OXEEPAP) Carry Forward	$ -
54	**Total EPA Carry Forward**	**$ 26,051,473**
55	Total Print Fee Revenue	$ 703,652
56	Disbursed in (OXEEPAA) Allotments	$ 143,608
57	PRINT FEE (OXEEPAP) Carry Forward	$ 560,044

Ex B 2/2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF OBJECTION OF ERIC ALAN ISAACSON TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

OBJECTION OF ERIC ALAN ISAACSON TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

As set forth in his accompanying declaration, Eric Alan Isaacson is a Class Member who would be bound by the Proposed Settlement of this matter. As set forth in his declaration, Isaacson opened his own PACER Account (No. 4166698) in March of 2016. He has paid quarterly PACER bills ever since. Isaacson's class-period PACER billings totaled $3,823.50. He has received reimbursement for only $171.80 of that amount. Thus, Isaacson's unreimbursed Class Period PACER expenditures come to $3,651.70. Isaacson expects no further reimbursements for those Class Period PACER charges.

For reasons set forth below, Isaacson respectfully objects to the Proposed Settlement and to the proposed attorney's fees and incentive awards.

I. INTRODUCTION

Rule 23(e)(2) permits the District Court to approve the Proposed Settlement "only on finding that it is fair, reasonable, and adequate after considering whether," among other things, "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment." Fed.R.Civ.P. 23(e)(2)(C). The Court also must consider whether "the proposal treats class members equitably relative to each other." Fed.R.Civ.P. 23(e)(2)(D).

Here the Settlement is objectionable because it treats Class Members inequitably, allocating far too much to a pro rata distribution on the basis of institutional PACER users and law firms whose Class Period PACER expenditures were reimbursed by their clients, from class-action settlement funds. *See infra* at 4-9. It also is inequitable because it allocates $10,000 apiece to the Named Plaintiffs as special bonuses in this, a Little Tucker Act case in which the Court's jurisdiction is limited to claims for $10,000 or less. *See* 28 U.S.C. §1346(a)(2). The special payments are, moreover, prohibited by decisions of the Supreme Court, sitting in equity, which hold that the equitable common-fund doctrine permits representative plaintiffs to recover their reasonable litigation expenses from a common-fund recovery, but which flatly prohibit any payment compensating litigants for their service as class representatives.

"Since the decisions in *Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v.* Pettus, 113 U.S. 116 (1885), [the Supreme] Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). But any additional payment to compensate representative plaintiffs for their own "personal services" on behalf of a class is both "decidedly objectionable" and "illegally made." *Greenough,* 105 U.S. at 537-38. A representative plaintiff's "claim to be compensated, out of the fund ... for his personal services" the Supreme Court "rejected as

unsupported by reason or authority." *Pettus,* 113 U.S. at 122. "Supreme Court precedent prohibits incentive awards."[1] *See infra* at 14-17.

Even more problematic, the Settlement allocates far too much to Class Counsel as attorney's fees. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. ... The result is what matters." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). But here Class Counsel have achieved a remarkably mediocre result. "According to class counsel, the absolute maximum possible recoverable damages here following the Federal Circuit's decision were around $500 million." DE158-4¶20 (Fitzpatrick decl.). Their fee expert, Brian Fitzpatrick, concludes that "the class is recovering 25% of what they might have received at trial had everything gone their way." DE158-4:13¶20 (Fitzpatrick decl.). That is exactly what large-stakes class actions can be expected to settle for without regard to the merits of the underlying claims. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 500 (1991)(finding that securities class actions "settled at an apparent 'going rate' of approximately one quarter of the potential damages"). It is, in the end, a run-of-the-mill settlement that does not justify the award of attorney's fees that Class Counsel seeks. It appears likely, quite frankly, that Class Counsel have sacrificed the Class's interests in order to obtain clearly extravagant attorney's fees for themselves of nearly four times their claimed lodestar—which lodestar is itself inadequately documented and unsupported. Their claimed billing rates far exceed those that their own expert has found should prevail in complex federal cases like this. *See infra* at 9-14.

[1] *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247, 1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("such service awards are foreclosed by Supreme Court precedent"); *cf. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 721 (2d Cir.2023)("Service awards are likely impermissible under Supreme Court precedent.").

II. THE SETTLEMENT IS NOT FAIR, REASONABLE, AND ADEQUATE

Named Plaintiffs have not demonstrated by a preponderance of the evidence that Rule 23's requirements are satisfied. First and foremost, they have failed to demonstrate that the Proposed Settlement is fair, reasonable, and adequate as required by Fed.R.Civ.P. 23(e)(2). They have not shown that relief provided for the class is adequate, taking into account the method of distributing relief to the class, and the request for Class Counsel to be compensated at nearly four times their reasonable hourly rates, Fed.R.Civ.P. 23(e)(2)(C)(ii), (iii), and they certainly have not shown that the proposal treats class members equitably relative to one another. Fed.R.Civ.P. 23(e)(D).

A. The Settlement Allocates Far Too Much Too Large PACER Users, Including Institutional Users Such as the Named Plaintiffs, Large Law Firms That Have Been Reimbursed by Their Clients, and Class-Action Lawyers Who Have Been Reimbursed from Class-Action Settlement Funds

Named Plaintiffs concede that they pushed for a purely pro-rata allocation among members, under which Class Members who spent the most on PACER during the Class Period would take the lion's share of the Settlement proceeds. But the largest users include large law firms, which themselves suffered no injury because they long ago passed most of the PACER charges that they paid on to their clients. The largest users also likely include plaintiffs-side class-action firms (like those representing Named Plaintiffs in this very action), which generally are reimbursed for PACER expenses when class actions settle. To the extent that the funds in this case are allocated to such class members, they constitute a windfall—at the expense of class members, such as Isaacson, whose Class Period PACER expenses were, in greatest part, neither passed on to clients nor otherwise reimbursed.

The Named Plaintiffs have purported to litigate this case in the interest of the little user. Their Complaint demanded compliance with Congress' intent that court documents "be 'freely available to the greatest extent possible.'" DE1:1 (quoting S.Rep. 107–174, 107th Cong., 2d Sess. 23 (2002)). They said that excessive PACER fees had "inhibited public understanding of the courts and thwarted equal access to justice," asserting that "the AO has further compounded these harms by discouraging fee waivers, even for *pro se* litigants," and "by hiring private collection lawyers

to sue people who cannot afford to pay the fees." DE1:1-2; *see also* DE1:11¶23; DE1:12¶25. Plaintiff National Consumer Law Center said it "seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans." DE1: 3¶2.

Yet when it came time to negotiate a settlement, the Named Plaintiffs abandoned such users—and the public interest—by advocating a purely pro-rata distribution of settlement funds that would favor large institutional users such as themselves, and that provides windfalls to large law firms that long ago passed their PACER charges on to paying clients, and to plaintiffs-side class-action lawyers (such as those representing the Named Plaintiffs) who have been fully reimbursed from settlement funds in other cases. Class Counsel concedes that in settlement negotiations with the government, Named Plaintiffs

> argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers—"to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. §1913 note.

DE158-5:10¶28 (Gupta decl.); *see also* DE158:23[ECFp31] ("plaintiffs and class counsel vigorously advocated for a pro-rata approach").

The government was right. Named Plaintiffs' advocacy for pro-rata distribution was grossly inappropriate. The "blend" reached as a compromise allocates far too much to a pro rata distribution that unfairly advantages large users and law firms that already have been reimbursed—and who accordingly receive inequitable windfalls under the Settlement.

The pro-rata portion of the distribution is calculated to produce unfair windfalls. Many law firms, particularly the larger ones, pass the PACER charges that they incur on to their clients and are reimbursed for them on thirty-day billing cycles.[2] Class-action lawyers have to wait a little

[2] *See Hallmark v. Cohen & Slamowitz, LLP,* 378 F. Supp. 3d 222, 236 (W.D.N.Y. 2019)(holding PACER fees are among "those ordinarily charged to clients"); *Godson v. Eltman, Eltman, & Cooper, P.C.,* 328 F.R.D. 35, 68 (W.D.N.Y. 2018)(holding PACER fees are among "those ordinarily charged to clients"); *Decastro v. City of New York,* No. 16-cv-3850 (RA), 2017 WL

longer—but they typically are reimbursed for PACER charges when class actions settle.[3] And we know that the great majority of class actions settle.[4] Indeed, Class Counsel's own fee expert

4386372, at *10 (S.D.N.Y. Sept. 30, 2017)(no contest that PACER fees are among the "out-of-pocket expenses ordinarily charged to clients").

[3] *See, e.g., Ciapessoni v. United States,* 145 Fed. Cl. 564, 565 (2019); *Godson v. Eltman, Eltman, & Cooper, P.C.,* 328 F.R.D. 35, 67 (W.D.N.Y. 2018); *In re Broadwing, Inc. ERISA Litig.,* 252 F.R.D. 369, 382 (S.D. Ohio 2006); *Lusk v. Five Guys Enterprises LLC*, No. 1:17-CV-0762 JLT EPG, 2023 WL 4134656, at *30 (E.D. Cal. June 22, 2023); *Stechert v. Travelers Home & Marine Ins. Co.,* No. CV 17-0784-KSM, 2022 WL 2304306, at *15 (E.D. Pa. June 27, 2022); *In re Wawa, Inc. Data Sec. Litig.,* No. CV 19-6019, 2022 WL 1173179, at *12 (E.D. Pa. Apr. 20, 2022); *Yanez v. HL Welding, Inc.,* No. 20CV1789-MDD, 2022 WL 788703, at *13 (S.D. Cal. Mar. 15, 2022); *Karl v. Zimmer Biomet Holdings, Inc.,* No. C 18-04176 WHA, 2022 WL 658970, at *6 (N.D. Cal. Mar. 4, 2022); *Curry v. Money One Fed. Credit Union,* No. CV DKC 19-3467, 2021 WL 5839432, at *6 (D. Md. Dec. 9, 2021); *Kudatsky v. Tyler Techs., Inc.,* No. C 19-07647 WHA, 2021 WL 5356724, at *5 (N.D. Cal. Nov. 17, 2021); *Espinal v. Victor's Cafe 52nd St., Inc.,* No. 16-CV-8057 (VEC), 2019 WL 5425475, at *5 (S.D.N.Y. Oct. 23, 2019); *Ott v. Mortg. Invs. Corp. of Ohio, Inc.,* No. 3:14-CV-00645-ST, 2016 WL 54678, at *6 (D. Or. Jan. 5, 2016); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp.,* No. CIV. 6:12-1609, 2015 WL 965696, at *11 (W.D. La. Mar. 3, 2015); *Jenkins v. Trustmark Nat. Bank,* 300 F.R.D. 291, 310 (S.D. Miss. 2014); *Hargrove v. Ryla Teleservices, Inc.,* No. 2:11CV344, 2013 WL 1897027, at *7 (E.D. Va. Apr. 12, 2013), *report and recommendation adopted,* 2013 WL 1897110 (E.D. Va. May 3, 2013); *Beard v. Dominion Homes Fin. Servs., Inc.,* No. C2 06 137, 2009 WL 10710409, at *7 (S.D. Ohio June 3, 2009); *In re Kirby Inland Marine, L.P.,* No. CIVA 04-611-SCR, 2008 WL 4642616, at *4 (M.D. La. Oct. 16, 2008), aff'd sub nom. In re Kirby Inland Marine LP, 333 F.App'x 872 (5th Cir.2009); *Rankin v. Rots,* No. 02-CV-71045, 2006 WL 1791377, at *3 (E.D. Mich. June 27, 2006); *Jordan v. Michigan Conf. of Teamsters Welfare Fund,* No. 96-73113, 2000 WL 33321350, at *6 (E.D. Mich. Sept. 28, 2000).

[4] *See* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (Federal Judicial Center, 2005)(according to a 2005 study, certified class actions settled ninety percent of the time); *Redman v. RadioShack Corp.,* 768 F.3d 622, 638 (7th Cir.2014)(noting, in connection with the settlement of a consumer class action, that "very few class actions are tried"); *West v. Prudential Sec., Inc.,* 282 F.3d 935, 937 (7th Cir.2002)("very few securities class actions are litigated to conclusion"); *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 52 (2d Cir.2000)("'there appears to be no appreciable risk of non-recovery" in securities class actions, because 'virtually all cases are settle[]'")(quoting Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan.L.Rev. 497, 578 (1991)); *In re Copley Pharm., Inc.,* 161 F.R.D. 456, 466 (D.Wyo.1995)("most class actions settle and few go to trial"); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L.Rev. 497, 578 (Feb.1991)(arguing that a multiplier designed to address the contingency factor in securities class actions is unnecessary since "there appears to be no appreciable risk of nonrecovery, for virtually all cases are settled"). "When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the

concedes that "the typical class action settles in only three years." DE158-4:14¶21 (Fitzpatrick decl.). So class-action law firms, like those representing the Named Plaintiffs in this matter, generally receive full reimbursement for their PACER expenditures when the class actions they litigate quite predictably settle.

What this means is that many, if not most, of the class members with the largest Class Period PACER expenditures have already been wholly compensated for all or most of what they spent on PACER. That is a powerful reason for this Court to endorse what Named Plaintiffs report was the government's position: that small users should receive full reimbursement. *See* DE158:21-22. Class Counsel Deepak Gupta explains:

> plaintiffs argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers— "to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note.

DE158-5:10¶28.

The government was correct. Public access to court records is critical to American Democracy. Small-scale users should be fully compensated. No significant portion of the Settlement fund should be allocated to the pro-rata distribution advocated by the Named Plaintiffs.

Including large claimants in a pro-rata distribution is problematic, moreover, because the Class cannot be defined to include any entities with claims totaling more than $10,000. Doing so would violate the Little Tucker Act. The Settlement's allocation appears to include, and to distribute Settlement funds to, entities whose claims exceed the Tucker Act's $10,000 jurisdictional limit. "District courts have jurisdiction under the Little Tucker Act to hear claims 'against the United States, ***not exceeding*** $10,000[.]'" *Nat'l Veterans Legal Servs. Program v.*

---

company, even if the betting odds are good." *Kohen v. Pacific Inv. Mgmt. Co. LLC,* 571 F.3d 672, 678 (7th Cir.2009).

United States, 968 F.3d 1340, 1347 (Fed.Cir.2020)(emphasis added)(quoting *Corr v. Metro. Washington Airports Auth.,* 702 F.3d 1334, 1336 (Fed.Cir.2012)(quoting 28 U.S.C. §1346(a)(2))).

If Isaacson, as a start-up solo-practitioner who paid PACER fees for less than three years of the eight-year class period, paid $3,823.50 in PACER fees, then many users—particularly institutional users, large law firms, and plaintiffs-side class-action firms—must have run up Class Period PACE bills totaling tens and even hundreds of thousands of dollars. This Court lacks jurisdiction to include them, and their claims, in the Class to whom the Settlement will be distributed. For by now "the question is settled—district courts lose their Little Tucker Act jurisdiction once the amount claimed accrues to more than $10,000, even though jurisdiction was previously proper in the district court." *Simanonok v. Simanonok,* 918 F.2d 947, 950-51 (Fed.Cir.1990). The Federal Circuit has held "the amount of a claim against the United States for back pay is the total amount of back pay the plaintiff stands ultimately to recover in the suit and is not the amount of back pay accrued at the time the claim is filed." *Smith v. Orr,* 855 F.2d 1544, 1553 (Fed.Cir.1988)(following *Chabal v. Reagan,* 822 F.2d 349 (3d Cir.1987); *see Simanonok,* 918 F.2d at 950-51; *see also Shaw v. Gwatney,* 795 F.2d 1351 (8th Cir.1986); *Goble v. Marsh,* 684 F.2d 12 (D.C.Cir.1982)). Clearly, then, Class Members whose claims exceed $10,000 are beyond this Court's Little Tucker Act jurisdiction.

"In a class action such as this, jurisdiction thereunder turns, not upon the aggregate amount of the claims [of all] the members of the class, but upon the amounts claimed individually by those members." *March v. United States,* 506 F.2d 1306, 1309 n.1 (D.C.Cir.1974); *see Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir.1981); *Pennsylvania v. National Association of Flood Insurers,* 520 F.2d 11, 25 (3d Cir.1975). Yet Little Tucker Act jurisdiction ultimately covers a class action only if, and to the extent that, "the individual claim of each class member does not exceed $10,000.00." *Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir.1981).

There is one way, of course, to preserve Little Tucker Act jurisdiction with respect to Class Members whose individual claims exceed $10,000. It is well established that "a plaintiff may pursue such a claim in a district court if the plaintiff waives his right to recover the amount

exceeding $10,000." *Smith v. Orr,* 855 F.2d 1544, 1552–53 (Fed. Cir.1988). That can be accomplished by abandoning the notion that large claimants have the right to a pro-rata distribution based on large claims that would place them beyond the jurisdictional limitation. No portion of the Settlement fund should be allocated on the basis of Class Members' PACER expenditures after the first $10,000 they paid during the Class Period. The first distribution should be capped at a much higher level than $350 apiece, and any pro-rata distribution of remaining funds should be based on Class Members' expenditures ***up to*** $10,000 apiece, thereby waiving Class Members' larger claims in order both to preserve Tucker Act jurisdiction, and also to achieve a more equitable distribution of the Settlement Fund.

B. The Attorney's Fees Sought Are Grossly Excessive

Class Counsel's expert, Professor Brian Fitzpatrick, says "that the fee request is more than reasonable." DE158-4:5¶8 (Fitzpatrick decl.).

It is, in fact, several times what the Supreme Court's precedents hold is a reasonable attorney's fee to fully compensate class plaintiffs' counsel in contingent class-action litigation that settles. For while the Supreme Court holds that class counsel ordinarily are adequately compensated with an unenhanced lodestar award, *see Perdue v. Kenny A. ex rel. Winn,* 559 U.S. 542, 546 (2010), Class Counsel here ask for roughly ***four times*** that amount. And while the Supreme Court has never approved a common-fund fee award exceeding ten percent of the common fund, Class Counsel in this case demand twice that. It appears that the driving concern in this settlement is Class Counsel's desire to capture an extravagant fee.

The Supreme Court holds that attorney's fees may be awarded from a common fund or equitable fund based either on the attorney's fees reasonably incurred and billed, *see Trustees v. Greenough,* 105 U.S. 527, 530-31, 537-38 (1882), or as a modest percentage of the fund, *see Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 128 (1885)(cutting fee award from 10% to 5%). At ***four times*** Class Counsel's claimed hourly rates, and more than twice the percentage supported by Supreme Court common-fund precedents, the attorney's fee award sought by Class Counsel is clearly excessive.

Class Counsel claim a lodestar of $6,031,678.25. DE158-5:22-23¶¶63-64 (Gupta decl.). Supreme Court precedent mandates "a strong presumption that the lodestar is sufficient," without any enhancement, to compensate plaintiffs' counsel when a contested class action settles. *Perdue,* 559 U.S. at 546 (2010); *see Haggart v. Woodley,* 809 F.3d 1336, 1355 n.19 (Fed.Cir.2016). Even in common-fund cases, such as this, "[t]here is a 'strong presumption' that the lodestar figure represents a reasonable fee." *Fischel v. Equitable Life Assur. Soc'y,* 307 F.3d 997, 1007 (9th Cir.2002)(citation omitted). "Because of [that] 'strong presumption that the lodestar is sufficient,' a multiplier is warranted only in 'rare and exceptional circumstances.'" *Chambers v. Whirlpool Corp.,* 980 F.3d 645, 665 (9th Cir.2020)(quoting *Perdue,* 559 U.S. at 546-52, and reversing a 1.68 lodestar multiplier).

"There is a 'strong presumption' that the lodestar figure represents a reasonable attorney's fee, [*Perdue,* 559 U.S. at 546], because '"the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee."'" *Heller v. District of Columbia,* 832 F. Supp. 2d 32, 37 (D.D.C. 2011)(quoting *Perdue,* 559 U.S. at 543(quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566 (1986)). "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant, *Perdue,* 559 U.S. at 553, who "must produce 'specific evidence'" supporting the enhancement. *Perdue,* 559 U.S. at 553. And, as *Perdue* itself emphasizes, "factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar." *Perdue,* 559 U.S. at 546.

Class Counsel have not demonstrated by a preponderance of the evidence that they are entitled to nearly four times their claimed lodestar. Acting as a fiduciary to the Class, this Court should not grant such an extravagant award.

Class Counsel contend that such a windfall is justified if only the attorney's fee is awarded as a percentage of the $125 million megafund settlement. After all, they say, they only want 19% of the fund. Yet the Supreme Court has never approved a percent-of-fund common-fund fee award exceeding ten percent of the fund.

In *Pettus,* for example, the Supreme Court slashed a common-fund award from ten percent to just five percent of the fund. The Court "consider[ed] whether the sum allowed appellees was too great. We think it was. The decree gave them an amount equal to ten per cent." Pettus, 113 U.S. at 128. "One-half the sum allowed was, under all the circumstances, sufficient." *Id.; see also Harrison v. Perea,* 168 U.S. 311, 325 (1897)(noting with approval the reduction of a $5,000 fee award (or about 14% of an equitable fund) to just 10% of the fund).

In *United States v. Equitable Trust Co.,* 283 U.S. 738 (1931), the Supreme Court rejected the notion that counsel whose efforts secure a fund may receive more than necessary to compensate them adequately for their time. The Second Circuit already had rejected the district court's conclusion that counsel were entitled to a quarter to a third of the fund, cutting the attorney's fee award to just $100,000 (about 15% of the fund) and warning that "[t]he allowance is a payment for legal services, not a speculative interest in a lawsuit." *Barnett v. Equitable Trust Co.*, 34 F.2d 916, 919 (2d Cir.1929)(Learned Hand). The attorneys then complained to the Supreme Court that "from a percentage standpoint, the allowance of $100,000 is but slightly over fifteen per cent," and that "never yet have counsel been cut down to such a low percentage in any contested case taken upon a contingent basis."[5] But the Supreme Court found even "the allowance of $100,000 unreasonably high, and that to bring it within the standard of reasonableness it should be reduced to $50,000," which was about $7^1/_2$% of the fund. *Equitable Trust,* 283 U.S. at 746. Those are old decisions, to be sure. But the Supreme Court's common-fund precedents remain controlling authority. *See, e.g., Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)(applying common-fund doctrine rooted in *Greenough* and *Pettus*); *Haggart v. Woodley,* 809 F.3d 1336, 1352 (Fed.Cir.2016)(favorably citing *Greenough* and *Pettus*).

And with the development of computerized research, automated document review, and digital storage and retrieval of documents, the difficulty and expense of litigation has surely fallen.

[5] Brief for Respondents to Whom Allowances Were Made, *United States v. Equitable Trust,* 283 U.S. 738 [Oct. Term 1929 No. 530], at 55-56 (filed April 16, 1930).

Given the tremendous economies of scale afforded by the class-action device in recovering the $125 million megafund in this case, the five percent of the fund found reasonable in *Pettus* would be wholly appropriate here too. Its reasonableness is, moreover, confirmed by a cross-check against Class Counsel's claimed lodestar. For five percent of the megafund is $6,250,000, and Class Counsel's claimed lodestar is only $6,031,678.25. DE158-5:22-23¶¶63-64 (Gupta decl.). A five-percent award gives Class Counsel something more than their lodestar which, according to *Perdue,* is presumptively sufficient to compensate them for their work on a settling contingent-fee class action.

Of course, that assumes that Class Counsel's lodestar is proper. It is not. Their lodestar is inadequately documented. Class Counsel submitted a summary declaration, giving total hours and billing rates, with no further itemization or explanation of the hours billed, or of the basis for the billing rates. That is not enough to support Class Counsel's purported lodestar.[6] Were appropriate deductions made, their lodestar would be much lower, and the multiplier for their requested fee award doubtless would exceed four.

The claimed lodestar amount is plainly excessive. Class Counsel's paid expert on fees, Professor Brian Fitzpatrick, has developed a matrix of reasonable "Hourly Rates ($) for Legal Fees for Complex Federal Litigation in the District of Columbia." *See* Isaacson Decl. Ex.D

[6] *Wojtkowski v. Cade,* 725 F.2d 127, 130 (1st Cir.1984)("The affidavit here was little more than a tally of hours and tasks relative to the case as a whole."); *McDonald v. Pension Plan,* 450 F.3d 91, 96 (2d Cir.2006)("In order to calculate the reasonable hours expended, the prevailing party's fee application must be supported by contemporaneous time records."); *Cadena v. Pacesetter Corp.,* 224 F.3d 1203, 1215 (10th Cir.2000)("'[I]f [prevailing parties] intend to seek attorney's fees ... [their attorneys] must keep meticulous, contemporaneous time records [.]"); *Harper v. City of Chicago Heights,* 223 F.3d 593, 605 (7th Cir.2000 ("[I]t is within a district court's power to reduce a fee award because the petition was not supported by contemporaneous time records."); In re Olson, 884 F.2d 1415, 1428 (D.C.Cir.1989 (disallowing entries that failed to identify the subject of a meeting, conference, or phone call and requiring contemporaneous records proving the reasonableness of hours and rates); *Grendel's Den v. Larkin,* 749 F.2d 945, 952 (1st Cir.1984)("in cases involving fee applications ... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award, or in egregious cases, disallowance"); *Savin ex rel. Savin v. Sec'y of Health & Hum. Servs.,* 85 Fed.Cl. 313, 317 & n.5 (2008).

[https://www.justice.gov/usao-dc/page/file/1189846/download]. Professor Fitzpatrick says his "Fitzpatrick Matrix" is based on research that "allowed us to determine the real hourly rates charged in the market" in complex federal litigation lilke this case. *See* Isaacson Decl. Ex.E. The highest reasonable 2021 billing rate for a lawyer with 35+ years' experience, according to Professor Fitzpatrick's official matrix, is $736 an hour. *See id.* Yet in this case, Class Counsel's lodestar is built on billing rates that grossly exceed what Fitzpatrick deemed reasonable for complex litigation in the District of Columbia. A 2002 Georgetown graduate, Deepak Gupta's time is billed at $1150 an hour, while 2010 Harvard graduate Jonathan E. Taylor's time is billed at $975 an hour—well over the rates deemed reasonable for complex litigation in the District of Columbia. DE158-5:22¶63. Turning to the Motley Rice lawyers, we find William Narwold billing at $1250 an hour, and Meghan Oliver at $950 an hour. DE158-5:5¶12.

Class Counsel have offered adequate justifications neither for their billing rates, nor for the hours claimed. Not even their own expert, Professor Brian Fitzpatrick, has opined that they are reasonable.

Neither have Class Counsel demonstrated that they should be entitled to any multiplier of their inadequately documented lodestar, or to a percentage fee of more than the five percent that the Supreme Court applied to a common-fund fee application in *Pettus,* which would more than adequately compensate them for their efforts.

Class Counsel's fee expert urges a dramatic upward departure from the attorney's fees supported by Supreme Court precedents—based on his own survey of nonprecedential published, and even unpublished district court rulings. Fitzpatrick ignores the fact that "[i]n the vast majority of cases, Class counsel appears before the court to request a big percentage of the settlement fund, cooperative settling Defendants offer no opposition, and class members rarely oppose the request." *In re Quantum Health Res., Inc.,* 962 F. Supp. 1254, 1256 (C.D. Cal. 1997). "The situation is a fundamental conflict of interest and is inherently collusive. The lack of opposition to a proposed fee award gives a court the sometimes false impression of reasonableness, and the court might simply approve a request for fees without adequate inquiry or comment." *In re Quantum Health*

Res., Inc., 962 F. Supp. 1254, 1256 (C.D. Cal. 1997)(footnote omitted). Fitzpatrick's survey thus is of minimal value.

Factors cited by Class Counsel and their expert do not justify the large fee. The case, though somewhat novel, was obviously an easy one to litigate. The central contest was on an issue of statutory construction. After the Federal Circuit clarified the law, *see National Veterans Legal Servs. Program v. United States,* 968 F.3d 1340, 1349 (Fed.Cir.2020), the case was an easy one to settle. And that, of course, eliminated any risk of nonpayment that Class Counsel might have faced had they taken the case to trial.

Named Plaintiffs and Class Counsel together seek "an award of attorneys' fees, settlement-administration and notice costs, litigation expenses, and service awards for the three class representatives in a total amount equal to 20% of the $125 million common fund." DE158:4[ECFp13]. Their motion also seeks "an award of $10,000 per class representative to compensate them for their time working on the case and the responsibility that they have shouldered" while Class counsel seeks "$23,863,345.02 in attorneys' fees," or nearly four times their claimed lodestar. DE158:4[ECFp13].

This Court should not award an attorney's fee amounting to more than Class Counsel's unenhanced lodestar recalculated at the rates set forth in their own fee expert's "Fitzpatrick Matrix."

C. The $10,000 Apiece Service Awards Named Plaintiffs Seek are Inequitable and Unlawful

The Supreme Court's foundational common-fund class-action precedents hold that payments compensating litigants for their service as class representatives are inequitable and illegal. *See Trustees v. Greenough,* 105 U.S. 527, 537 (1882); *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116, 122 (1885). The Eleventh Circuit thus soundly holds that "Supreme Court precedent prohibits incentive awards."[7] And the Second Circuit recently conceded: "Service

[7] *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir.2020), *reh'g denied,* 43 F.4th 1138 (11th Cir.2022); *accord, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.,* 999 F.3d 1247,

awards are likely impermissible under Supreme Court precedent." *Fikes Wholesale v. HSBC Bank USA,* 62 F.4th 704, 721 (2d Cir.2023).

So "any service award in a class action is at best dubious under *Greenough*." *Fikes Wholesale,* 62 F.4th at 723; *see also id.* at 729 (Jacobs, Cir.J., concurring). The Second Circuit nonetheless chooses to follow its own decisions sustaining incentive awards—rather than the Supreme Court's decisions banning them:

> But practice and usage seem to have superseded Greenough (if that is possible). *See Melito v. Experian Mktg. Sols. Inc.,* 923 F.3d 85, 96 (2d Cir.2019); *Hyland v. Navient Corp.,* 48 F.4th 110, 123-24 (2d Cir.2022). And even if (as we think) practice and usage cannot undo a Supreme Court holding, *Melito* and *Navient* are precedents that we must follow.

Fikes Wholesale, 62 F.4th at 721.

Supreme Court precedent cannot be superseded by lower courts' contrary practice and usage. Lower courts are not at liberty to reject Supreme Court precedents as obsolescent. In fact, "the strength of the case for adhering to such decisions grows in proportion to their 'antiquity.'" *Gamble v. United States,* 139 S.Ct. 1960, 1969 (2019)(citing *Montejo v. Louisiana,* 556 U.S. 778, 792 (2009). Even if a Supreme Court precedent was "'unsound when decided'" and even if it over time becomes so "'inconsistent with later decisions'" as to stand upon "'increasingly wobbly, moth-eaten foundations,'" it remains the Supreme Court's "prerogative alone to overrule one of its precedents."[8] The Supreme Court holds: "If a precedent of this Court has direct application in a

---

1257 (11th Cir.2021)("such awards are prohibited"); *Medical & Chiropractic Clinic, Inc. v. Oppenheim,* 981 F.3d 983, 994 n.4 (11th Cir.2020)("such service awards are foreclosed by Supreme Court precedent").

[8] *State Oil Co. v. Khan,* 522 U.S. 3, 9, 20 (1997)(quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir.1996)(Posner, J.)); *accord, e.g., Payne v. Taslimi,* 998 F.3d 648, 654 (4th Cir.2021); *Acorda Therapeutics Inc. v. Mylan Pharms. Inc.,* 817 F.3d 755, 770 (Fed.Cir.2016)(O'Malley, Cir.J., concurring).

case," as *Greenough* does here, a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); *accord, e.g., Mallory v. Norfolk S. Ry. Co.,* 143 S. Ct. 2028, 2038 (2023).

But even if *Greenough* and *Pettus* do not altogether bar incentive awards, such payments are appropriate only when actually necessary. The Ninth Circuit in *In re Apple Inc. Device Performance Litig.,* 50 F.4th 769, 786 (9th Cir.2022), for example, construed *Greenough* not as a decision that prohibits incentive awards in general, but as one that prohibits incentive awards unless they are necessary to induce the named plaintiffs to pursue the case:

> While private plaintiffs who recover a common fund are entitled to "an extra reward," they are limited to "that which is deemed 'reasonable' under the circumstances." *Id. Greenough,* for example, prohibited recovery for the plaintiff's "personal services and private expenses" because the private plaintiff was a creditor who needed no inducement to bring suit. *Greenough,* 105 U.S. at 537.

In re Apple Inc. Device Performance Litig., 50 F.4th 769, 786 (9th Cir.2022).

The Seventh Circuit similarly holds that incentive awards are appropriate only when "'necessary to induce an individual to participate in the suit.'"[9]

But here, as in *Greenough,* the Named Plaintiffs had substantial claims of their own, and they clearly "needed no inducement to bring suit." *Apple Device,* 50 F.4th at 786. This Court has recognized that they already had "dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent." DE33:14. Named Plaintiffs presented their missions as

[9] *Camp Drug Store v. Cochran Wholesale Pharmaceutical,* 897 F.3d 825, 834 (7th Cir.2018)(citation omitted); *see also In re Synthroid Mktg. Litig.,* 264 F.3d 712, 722 (7th Cir.2001)("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Montgomery v. Aetna Plywood, Inc.,* 231 F.3d 399, 410 (7th Cir.2000)("Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit.").

nonprofits as their motivations to pursue this litigation. They never needed special $10,000 payments to induce them to file suit.

Finally, anyone who seeks an incentive award must document their time on the case. As the Sixth Circuit has held:

> The settlement agreement provides for incentive awards of up to $10,000 per individual named plaintiff .... Class counsel argues in conclusory terms that the awards compensate the named plaintiffs for their time spent on the case. To ensure that these amounts are not in fact a bounty, however, counsel must provide the district court with specific documentation—in the manner of attorney time sheets—of the time actually spent on the case by each recipient of an award.

Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 311 (6th Cir.2016). "Otherwise the district court has no basis for knowing whether the awards are in fact 'a disincentive for the [named] class members to care about the adequacy of relief afforded unnamed class members[.]'" *Id.* (quoting *In re Dry Max Pampers Litig.,* 724 F.3d 713, 722 (6th Cir.2013)(emphasis in original).

Named Plaintiffs neither kept, nor presented, the required documentation. *See, e.g.,* DE158:2¶2 (Rossman decl.)("our organization did not keep formal time records"). That is another reason that the payments should be denied.

III. CONCLUSION

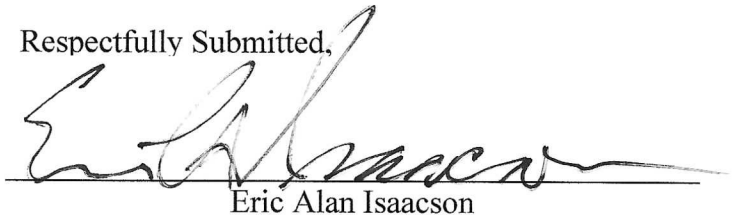
Although Named Plaintiffs insist that they "'enjoy a presumption of fairness afforded by [this] court's preliminary fairness determination,'" DE158:18[ECFp26] (quoting *Ciapessoni v. United States,* 145 Fed. Cl. 685, 688 (2019)), and also that any settlement "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery" similarly enjoys a "'presumption of fairness, adequacy, and reasonableness,'" DE158:19-20 (quoting *Kinard v. E. Capitol Fam. Rental, L.P.,* 331 F.R.D. 206, 215 (D.D.C.2019)), Rule 23 neither authorizes nor permits any such presumptions. In fact, "Rule 23(e)(2) assumes that a class action settlement is invalid." *Briseno v. Henderson,* 998 F.3d 1014, 1030 (9th Cir.2021).

The Settling Parties have not carried their burden of demonstrating by a preponderance of the evidence that this one is fair, reasonable, and adequate. It is not. Named Plaintiffs seek to

allocate far too much of the Settlement fund to their lawyers, as attorney's fees, and to themselves in special $10,000 incentive awards, and with a further pro-rata distribution that favors large users and that awards windfalls to large law firms and to class-action plaintiffs' counsel.

DATED: September 12, 2023

Respectfully Submitted,



Eric Alan Isaacson

LAW OFFICE OF ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231
Telephone: (858)263-9581
Email: ericalanisaacson@icloud.com

DECLARATION OF ERIC ALAN ISAACSON

I, Eric Alan Isaacson, declare and state as follows:

1. I am over the age of eighteen, make this declaration based on my personal knowledge and, if called as a witness, would testify competently as to the facts stated herein.

2. I make this declaration in support of my objection to approval of the proposed class-action settlement, award of attorney's fees, and of service awards, in *National Veterans Legal Services Program, et al. v. United States of America,* Civil No. 16-745-PLF, which is pending in the United States District Court for the District of Columbia.

3. A 1982 baccalaureate graduate of Ohio University, I hold a 1985 J.D. with high honors from the Duke University School of Law, and in May of 2022 I graduated from the Harvard Divinity School with a Master of Religion and Public Life.

4. Continuing my graduate studies, I recently enrolled in the Harvard Extension School, where am working toward a Master of Liberal Arts in Extension Studies in the field of History.

5. I have been a member in good standing of the bar of the State of California (No. 120584) since 1985.

6. I was a founding partner of the law firm of Robbins, Geller, Rudman & Dowd LLP (f.k.a. Lerach Coughlin Stoia Geller Rudman & Robbins LLP), where I practiced law from May 1, 2004 to March 15, 2016.

7. Since March of 2016, I have practiced law from the LAW OFFICE OF ERIC ALAN ISAACSON, 6580 Avenida Mirola, La Jolla, CA 92037.

8. I am informed and believe I am a member of the Class who would be bound by the proposed Settlement in this matter because I paid PACER bills during the Class Period, and I received an email notice of the Class Action Settlement.

9. In March of 2016, I opened my own PACER account (No. 4166698), for which I have paid quarterly the PACER bills ever since.

10. A true and correct of copy my short-form curriculum vita is attached as Exhibit A hereto.

11. A true and correct copy of the email Class Notice that I received concerning this matter is attached as Exhibit B hereto.

12. My Class Period PACER billings under that account totaled $3,823.50, as evidenced by invoices and emails attached as Exhibit C hereto.

13. Attached as Exhibit D hereto is a true and correct copy of "The Fitzpatrick Matrix," a document "prepared by Brian Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School, with the help of his students," and "Published by the U.S. Attorney's Office for the District of Columbia, Civil Division," that I downloaded today from https://www.justice.gov/usao-dc/page/file/1189846/download, and for which I have prepared the following bitly link: https://bit.ly/USAOfitz

14. Attached as Exhibit E hereto is a true and correct copy of *Fee matrix developed by Professor Brian Fitzpatrick and Brooke Levy '22 adopted by Federal Court*," Feb.7, 2023, that I downloaded today from https://law.vanderbilt.edu/news/fee-matrix-developed-by-professor-brian-fitzpatrick-and-brooke-levy-22-adopted-by-federal-court/ and for which I have prepared the following bitly link: https://bit.ly/463kPjs

15. I have received reimbursement (from a client) for only $171.80 of the foregoing $3,823.50 Class Period PACER expenditures. Thus, my total unreimbursed Class Period PACER expenditures come to $3,651.70.

16. I seldom seek reimbursement from clients for my PACER expenditures, and I have not had occasion to seek reimbursement for any of my Class Period PACER expenditures from the settlement fund in any court proceeding.

17. I do not expect to seek or receive any further reimbursement of my remaining $3,651.70 in unreimbursed Class Period PACER expenditures.

18. A substantial portion of my Class Period PACER expenditures reflect research in connection with my own personal scholarship in matters of law and economics.

19. A substantial portion of my legal practice during the Class Period was devoted to pro bono matters in which I incurred and paid expenses for documents downloaded from PACER for which I did not seek, and never will seek, reimbursement. These included, for example:

- *EEOC v. R.G. & G.R. Harris Funeral Homes,* 884 F.3d 560 (6th Cir.2018) – Briefed for amicus curiae Unitarian Universalist Association, supporting the EEOC and defending a transgender employee's right not to be subjected to religiously motivated workplace discrimination. (Amicus brief filed April 28, 2017);
- *Janus v. AFSCME, Council 31,* 585 U.S. __, 138 S.Ct. 2584 (June 27, 2018) – Counsel of Record for amici curiae Faith in Public Life, religious organizations, and faith leaders supporting respondent labor union and the need for labor-union fair-share agency fees. (Amicus brief filed January 19, 2018);
- *Voice of the Ex-offender v. Louisiana,* 249 So.3d 857 (La.Ct.App. 1st Cir.2018), *cert. denied,* 255 So.3d 575 (La.2018)(Chief Justice Johnson dissenting) – Co-counsel for amici curiae of historians Walter C. Stern, et al., supporting the right of released ex-offenders to vote. (Amicus brief filed February 21, 2018).

20. I object to the proposed Settlement in *National Veterans Legal Services Program, et al. v. United States of America,* Civil No. 16-745-PLF, and in particular to the requested attorney's fee award, and the requested service awards, for reasons stated in the Objection of Eric Alan Isaacson that this declaration accompanies.

21. I have pressed objections in other class actions, but have always done so with the objective of improving the quality of class-action settlements and of developing what I regard as sound principles of law.

22. Both during the Class Period and after I have sought, with some success, to improve class-action practice in the United States. *See, e.g., Moses v. New York Times Co*., No. 21-2556-CV, __F.4th__, 2023 WL 5281138, at *1 (2d Cir. Aug. 17, 2023)("we agree with Isaacson that the

district court exceeded its discretion when it approved the settlement based on the wrong legal standard in contravention of Rule 23(e)"); *Murray v. Grocery Delivery E-Servs. USA Inc.,* 55 F.4th 340, 342 (1st Cir.2022)("we vacate [settlement] approval because the absence of separate settlement counsel for distinct groups of class members makes it too difficult to determine whether the settlement treated class members equitably"); *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1248 (11th Cir.2020)("We find that, in approving the settlement here, the district court repeated several errors that, while clear to us, have become commonplace in everyday class-action practice. ... [I]t handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."); *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917 (11th Cir.2020)(en banc)(sustaining objection that a representative plaintiff who suffered no injury lacked Article III standing to represent and compromise the interests of the class); *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.,* 888 F.3d 455, 458 (10th Cir.2017) (reversing $17.3 million class-action attorney's fee award).

23. None of my objections to class-action settlements or attorney's fee awards have been found to be frivolous, and none have been made for improper purposes.

24. I have never pressed an objection in order to extract a payment in return for the objection's withdrawal, or for the dismissal of any resulting appeal.

25. I will not accept any payment in return for withdrawing my objection in this case, for foregoing an appeal, or for dismissing any appeal.

26. I am, moreover, willing to be bound by a court order absolutely prohibiting any such payment in this case.

27. I desire to be heard at the October 12, 2023, Final Approval Hearing in the above-captioned matter, either in person or remotely by means of telephone or video conferencing.

I declare under penalty of perjury pursuant to the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on September 12, 2023, at La Jolla, California.

Eric Alan Isaacson

Eric Alan Isaacson
Law Office of Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037-6231
(858)263-9581
ericalanisaacson@icloud.com

EXHIBIT A

ERIC ALAN ISAACSON

LAW OFFICE OF ERIC ALAN ISAACSON – https://www.ericalanisaacson.com
6580 Avenida Mirola, La Jolla, CA 92037-6231
ericalanisaacson@icloud.com, eri628@g.harvard.edu
(858) 263-9581

EDUCATION:

- Harvard Extension School, working toward a Master of Liberal Arts (ALM) in Extension Studies, field of History
- Harvard Divinity School, M.R.P.L. 2022
- Duke University School of Law, J.D. with high honors, 1985; Order of the Coif; *Duke Law Journal* (Member 1983-1984 & Note Editor 1984-1985); Research Assistant to Prof. William A. Reppy, Jr. (summer 1983)
- Ohio University, A.B. with high honor, 1982

PROFESSIONAL EMPLOYMENT:

- Law Office of Eric Alan Isaacson (March 16, 2016 to present); Robbins Geller Rudman & Dowd LLP, f.k.a. Lerach Coughlin Stoia Geller Rudman & Robbins LLP (founding partner, May 1, 2004 to March 15, 2016)
- Milberg Weiss Bershad Hynes & Lerach LLP (partner, January 1994 through April 2004; associate, November 1989 through December 1993); • O'Melveny & Myers, Los Angeles (associate, 1986-1989)
- U.S. Court of Appeals for the Ninth Circuit (law clerk to Hon. J. Clifford Wallace, 1985-1986)

BAR ADMISSIONS:

California (1985); Supreme Court of the United States (1995); also admitted to practice before the U.S. Courts of Appeals for the First through Eleventh Circuits, Federal Circuit, and D.C. Circuit, and before all federal district courts in California and Oklahoma

SELECTED PUBLICATIONS:

- *A Real-World Perspective on Withdrawal of Objections to Class-Action Settlements and Attorneys' Fee Awards: Reflections on the Proposed Revisions to Federal Rule of Civil Procedure 23(e)(5),* 10 ELON L. REV. 35 (2018) [https://bit.ly/3fKYLB8]
- *The Roberts Court and Securities Class Actions: Reaffirming* Basic *Principles,* 48 AKRON L. REV. 923 (2015) [https://bit.ly/33mWZRJ]
- *Free Exercise for Whom? – Could the Religious-Liberty Principle that Catholics Established in* Perez v. Sharp *Also Protect Same-Sex Couples' Right to Marry?,* 92 U. DET. MERCY L. REV. 29 (2015) [https://bit.ly/3fJnZjs]
- Goodridge *Lights A Nation's Way to Civic Equality,* BOSTON BAR J., Nov. 15, 2013 [https://bit.ly/33qHiZS]
- *Are Same-Sex Marriages Really a Threat to Religious Liberty?,* 8 STANFORD J. CIV. RTS. & CIV. LIBERTIES 123 (2012) [https://bit.ly/2Vr3Fu5]
- *Assaulting America's Mainstream Values: Hans Zeiger's* Get Off My Honor: The Assault on the Boy Scouts of America, 5 PIERCE L. REV. 433 (2007) [https://bit.ly/3q3P3P8]
- *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations,* 17 GEO. MASON U. CIV. RTS. L.J. 1 (2006) [https://bit.ly/3li1yTI]

- (with Patrick J. Coughlin & Joseph D. Daley) *What's Brewing in* Dura v. Broudo*? The Plaintiffs' Attorneys Review the Supreme Court's Opinion and its Import for Securities-Fraud Litigation,* 37 LOYOLA U. CHICAGO L. J. 1 (2005) [https://bit.ly/3lhnf6u]
- (with William S. Lerach) *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996) [https://bit.ly/3wLmgBY]
- *The Flag Burning Issue: A Legal Analysis and Comment,* 23 LOYOLA L.A. L. REV. 535 (1990) [https://bit.ly/3qkKYX8]

VOLUNTEER SERVICE:

- Skinner House Books, Editorial Board member, June 2016 to present;
- American Constitution Society, San Diego Lawyer Chapter, Steering Committee Member ,January 2008 to August 2009, and Board Member, August 2009 to present
- First Unitarian Universalist Church of San Diego, youth leader, September 2019 to June 2020; children's religious-education leader, September 2004 to June 2019; delegate to Unitarian Universalist Association General Assemblies of 2019, 2018, 2017, 2015, 2014 & 2009; Worship Welcome Team, member, May 2008 to May 2011

SELECTED PRO BONO *AMICUS CURIAE* BRIEFS:

- *Janus v. AFSCME, Council 31,* 138 S.Ct. 2448 (2018), brief for *amici curiae* Faith in Public Life, *et al.*, supporting public employees' labor-union fair-share agency fees [http://bit.ly/2KohwKr]
- *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), brief for *amicus curiae* Unitarian Universalist Association, supporting transgender employee's right not to be subjected to religiously motivated workplace discrimination [http://bit.ly/2yKxm0z]
- *Obergefell v. Hodges,* 576 U.S. 644 (2015), brief for *amici curiae* California Council of Churches, *et al.*, supporting same-sex couples' right to marry [https://bit.ly/34KqJJL]
- *Hollingsworth v. Perry,* 570 U.S. 693 (2013), brief for *amici curiae* California Council of Churches, *et al.*, supporting same-sex couples' right to marry [https://bit.ly/2HNQr79]
- *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014), brief for *amici curiae* California Faith for Equality, *et al.*, supporting California legislation barring healthcare professionals from subjecting minors to "Sexual Orientation Change Efforts" [https://bit.ly/2HCINwD]
- *Log Cabin Republicans v. United States,* 658 F.3d 1162 (9th Cir. 2011), brief for *amici curiae* Forum on the Military Chaplaincy, *et al.*, supporting the Log Cabin Republicans' challenge to "Don't Ask Don't Tell" [https://bit.ly/3mCXiiS]
- *Perry v. Brown,* 52 Cal. 4th 1116, 265 P.3d 1002 (2011), brief for *amici* California Faith for Equality, *et al.*, on questions certified to the California Supreme Court [https://bit.ly/2JkT6pu]
- *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012), brief for *amici curiae* California Faith for Equality, et al., supporting same-sex couples' challenge to California Proposition 8's ban on same-sex marriages [https://bit.ly/37OtnQu]
- *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Cal. 2010), brief for *amici curiae* Unitarian Universalist Legislative Ministry California, *et al.* [https://bit.ly/3mwYQuD]
- *Strauss v. Horton,* 46 Cal. 4th 364, 377-78, 207 P.3d 48, 93 Cal. Rptr. 3d 591 (2009), brief for *amici curiae* California Council of Churches, *et al.,* opposing California's Proposition 8 [https://bit.ly/3mtYpRE]

- *In re Marriage Cases,* 43 Cal.4th 757, 183 P.3d 384, 76 Cal.Rptr.3d 683 (2008), on team filing *amicus curiae* brief for the Unitarian Universalist Association, *et al.*, supporting the right of same-sex couples to marry [https://bit.ly/2VdpcpL]
- *In re Marriage Cases,* 49 Cal.Rptr.3d 675 (Cal. App. 1st Dist. 2006), on team filing *amicus curiae* brief for the General Synod of the United Church of Christ, *et al.*, supporting the right of same-sex couples to marry [https://bit.ly/3miFMR6]

AWARDS:

- American Constitution Society San Diego Lawyer Chapter's third annual *Roberto Alvarez Award*, January 29, 2014
- San Diego Democrats for Equality *Eleanor Roosevelt Award for Community Service,* November 17, 2012
- Unitarian Universalist Association *President's Annual Award for Volunteer Service*, June 28, 2009 [https://bit.ly/3GzRT6K]

EXHIBIT B

From: **PACER Fees Class Action Administrator** donotreply@pacerfeesclassaction.com
Subject: PACER Fees – Notice of Class Action Settlement
Date: July 6, 2023 at 8:34 PM
To: ericalanisaacson@icloud.com

Account ID: 10176234
PIN: 328319

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged users of PACER (the Public Access to Court Electronic Records system) more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have first paid PACER fees between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else to participate. Class Counsel's fees and expenses will be deducted from the common fund. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. Stay in the settlement. By doing nothing, you remain part of this class action settlement. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything further to receive money from the settlement. You will be legally bound by all orders and judgments of this Court, and will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. By doing nothing you give up any rights to sue the United States government separately about the same claims in this lawsuit. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Exclude yourself from the settlement. Alternatively, you have the right to not be part of this settlement by excluding yourself or "opting out" of the settlement and Class. If you exclude yourself, you cannot get any money from the settlement, but you will keep your right to separately sue the United States government over the legal issues in this case. If you do not wish to stay in the Class, you must request exclusion in one of the following ways:

1. Send an "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from *National Veterans Legal Services Program, et al. v. United States,* Case No. 1:16-cv-00745-PLF. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.
2. Complete and submit online the Exclusion Request form found here by Sunday, August 20th, 2023.
3. Send an "Exclusion Request" Form, available here, by mail. You must mail your Exclusion Request form, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

If you choose to exclude yourself from the lawsuit, you should decide soon whether to pursue your own case because your claims may be subject to a statute of limitations which sets a deadline for filing the lawsuit within a certain period of time.

OPTION 3. Stay in the Class and object or go to a hearing. If you paid PACER fees and do not opt out of the settlement, you may object to any aspect of the proposed settlement. Your written objection must be **sent by Tuesday, September 12th, 2023** and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023

request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

If ericalanisaacson@icloud.com should not be subscribed or if you need to change your subscription information for KCC/USO, please use this preferences page.

EXHIBIT C

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 04/07/2016
Usage From: 01/01/2016 to: 03/31/2016

Account Summary

Pages:	958
Rate:	$0.10
Subtotal:	$95.80
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$95.80
Previous Balance:	$0.00
Current Balance:	**$95.80**

Total Amount Due: $95.80

Account #:	4166698
Invoice #:	4166698-Q12016
Due Date:	05/10/2016
Amount Due:	$95.80

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

PACER Website, Manage My Account Updates

Over the past few months, PACER has made some updates to create a more helpful and efficient experience for users. The following list provides details on the improvements:

- **BrowseAloud:** This screen reader program is available on pacer.gov, the PACER Case Locator (PCL), and the Case Search Sign In page. It assists users with a wide range of needs by reading website text out loud.
- **Setting a Default in Manage My Account:** Users no longer need to select an icon (P, F, or A) to designate a default or autobilling method of payment. Instead, two new links (Set autobill and Set default) make the selection simpler and easier.
- **Checking E-File Status:** This link (under the Maintenance tab in Manage My Account) now automatically provides a list of the courts in which you have registered instead of requiring the user to select from a drop-down list.

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	05/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $95.80, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 07/05/2016
Usage From: 04/01/2016 to: 06/30/2016

Account Summary

Pages:	4,751
Rate:	$0.10
Subtotal:	$475.10
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$475.10
Previous Balance:	$0.00
Current Balance:	**$475.10**

Total Amount Due: $475.10

Account #:	4166698
Invoice #:	4166698-Q22016
Due Date:	08/10/2016
Amount Due:	$475.10

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Preparing for NextGen CM/ECF

Over the past year, several appellate, district, and bankruptcy courts throughout the country have implemented the next generation (NextGen) CM/ECF system. While most courts have not yet set a date for when they will switch to NextGen, you can begin preparing now by upgrading your PACER account. To learn more, visit the NextGen information page at pacer.gov/nextgen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	08/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $475.10, will be charged to the credit card on file up to 7 days before the due date.
Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 10/05/2016
Usage From: 07/01/2016 to: 09/30/2016

Account Summary

Pages:	8,937
Rate:	$0.10
Subtotal:	$893.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$893.70
Previous Balance:	$0.00
Current Balance:	**$893.70**

Account #:	4166698
Invoice #:	4166698-Q32016
Due Date:	11/10/2016
Amount Due:	$893.70

Total Amount Due: $893.70

Preparing for NextGen CM/ECF

In recent months, as more courts throughout the country have implemented the next generation (NextGen) CM/ECF system, some users have encountered issues that can affect account access and registration. The resources listed below can help you avoid many of these issues, creating a smooth transition when your court converts. Check your court's website for updates on when it will implement NextGen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	11/10/2016	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $893.70, will be charged to the credit card on file up to 7 days before the due date.
Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 01/09/2017
Usage From: 10/01/2016 to: 12/31/2016

Account Summary

Pages:	3,794
Rate:	$0.10
Subtotal:	$379.40
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$379.40
Previous Balance:	$0.00
Current Balance:	**$379.40**

Account #:	4166698
Invoice #:	4166698-Q42016
Due Date:	02/10/2017
Amount Due:	$379.40

Total Amount Due: $379.40

Preparing for NextGen CM/ECF

In recent months, as more courts throughout the country have implemented the next generation (NextGen) CM/ECF system, some users have encountered issues that can affect account access and registration. The resources listed below can help you avoid many of these issues, creating a smooth transition when your court converts. Check your court's website for updates on when it will implement NextGen.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	02/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $379.40, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 04/05/2017
Usage From: 01/01/2017 to: 03/31/2017

Account Summary

Pages:	3,607
Rate:	$0.10
Subtotal:	$360.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$360.70
Previous Balance:	$0.00
Current Balance:	**$360.70**

Account #:	4166698
Invoice #:	4166698-Q12017
Due Date:	05/10/2017
Amount Due:	$360.70

Total Amount Due: $360.70

Eighth Circuit Converts to NextGen

In January, the Eighth Circuit Court of Appeals implemented the next generation (NextGen) CM/ECF system. To date, a total of 10 courts have converted, and more courts will follow in the coming months. See the following websites for what to do when your court announces it will make the transition.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	05/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $360.70, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 07/06/2017
Usage From: 04/01/2017 to: 06/30/2017

Account Summary

Pages:	6,447
Rate:	$0.10
Subtotal:	$644.70
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$644.70
Previous Balance:	$0.00
Current Balance:	**$644.70**

Account #:	4166698
Invoice #:	4166698-Q22017
Due Date:	08/10/2017
Amount Due:	$644.70

Total Amount Due: $644.70

Tenth Circuit Converts to NextGen

In May, the Tenth Circuit Court of Appeals implemented the next generation (NextGen) CM/ECF system. To date, a total of 11 courts have converted, and more courts will follow in the coming months. See the following websites for what to do when your court announces it will make the transition.

- **NextGen Help** (pacer.gov/nextgen): Provides general information about NextGen conversion
- **Electronic Learning Modules** (pacer.gov/ecfcbt/cso/index.html): Provides user training for new NextGen features
- **NextGen CM/ECF FAQs** (pacer.gov/psc/hfaq.html): Answers common NextGen-related questions
- **Court Links** (pacer.gov/psco/cgi-bin/links.pl): Shows which courts have converted

Contact Us

San Antonio: (210) 301-6440
Toll Free: (800) 676-6856
Hours: 8 am - 6 pm CT M-F
pacer@psc.uscourts.gov

See pacer.gov/billing for detailed billing transactions, instructions for disputing transactions, FAQs, and more.

It's quick and easy to pay your bill online with a credit card. Visit the **Manage My Account** section of the PACER Service Center website at pacer.gov.

The PACER Federal Tax ID is:
74-2747938

Questions about the invoice?
Visit **pacer.gov/billing**

Please detach the coupon below and return with your payment. ***Thank you!***

PACER
Public Access to Court Electronic Records

Account #	Due Date	Amount Due
4166698	08/10/2017	Auto Bill

Do not send cash. Make checks or money orders drawn on a U.S. Bank in U.S. dollars payable to: PACER Service Center. Include your account ID on the check or money order.

This account is registered for automatic billing. The total amount due, $644.70, will be charged to the credit card on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

Visit pacer.gov for address changes.

Law Office of Eric Alan Isaacson
Eric Alan Isaacson
6580 Avenida Mirola
La Jolla, CA 92037

PACER Service Center
P.O. Box 71364
Philadelphia, PA 19176-1364

From: do_not_reply@psc.uscourts.gov
Subject: 4166698 October 2017 PACER Quarterly Invoice
Date: October 14, 2017 at 4:40 AM
To: ericalanisaacson@icloud.com

PACER
PUBLIC ACCESS TO COURT ELECTRONIC RECORDS
UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$288.70
Due Date:	11/09/2017
	This account is registered for automatic billing. The tot amount due, $288.70, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

Go to Billing for detailed billing transactions, instructions on disputing charges, FAQs, and more.

NOTE: *Please do not reply to this message. If you have questions or comments, please email them to PACER or call us at (800) 676-6856.*

From: do_not_reply@psc.uscourts.gov
Subject: 4166698 January 2018 PACER Quarterly Invoice
Date: January 13, 2018 at 1:48 AM
To: ericalanisaacson@icloud.com

PACER
PUBLIC ACCESS TO COURT ELECTRONIC RECORDS
UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$280.60
Due Date:	02/09/2018
	This account is registered for automatic billing. The tot amount due, $280.60, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

Go to Billing for detailed billing transactions, instructions on disputing charges, FAQs, and more.

NOTE: *Please do not reply to this message. If you have questions or comments, please email them to PACER or call us at (800) 676-6856.*

From: do_not_reply@psc.uscourts.gov
Subject: 4166698 April 2018 PACER Quarterly Invoice
Date: April 14, 2018 at 1:44 AM
To: ericalanisaacson@icloud.com

PACER
PUBLIC ACCESS TO COURT ELECTRONIC RECORDS
UNITED STATES COURTS

Account Number:	4166698
Account Contact:	Eric Alan Isaacson
Balance Due:	$404.80
Due Date:	05/10/2018
	This account is registered for automatic billing. The tot amount due, $404.80, will be charged to the credit car on file up to 7 days before the due date. Charges will appear on your credit card statement as: PACER 800-676-6856 IR.

To access the statement:

- Log in to Manage My Account.
- From the **Usage** tab, select **View Quarterly Invoice/Statement of Account**.

Go to Billing for detailed billing transactions, instructions on disputing charges, FAQs, and more.

NOTE: *Please do not reply to this message. If you have questions or comments, please email them to PACER or call us at (800) 676-6856.*

EXHIBIT D

THE FITZPATRICK MATRIX

Hourly Rates ($) for Legal Fees for Complex Federal Litigation in the District of Columbia

Years Exp. / Billing Yr.	2013	2014	2015	2016	2017	2018	2019	2020	2021
35+	535	563	591	619	647	675	703	731	736
34	534	562	590	618	646	674	702	729	734
33	532	560	588	616	644	672	700	728	733
32	530	558	586	614	642	670	698	726	730
31	527	555	583	611	639	667	695	723	728
30	524	552	580	608	636	664	692	720	725
29	521	549	577	605	633	661	689	717	721
28	517	545	573	601	629	657	685	713	717
27	512	540	568	596	624	652	680	708	713
26	508	536	564	592	620	648	676	704	708
25	502	530	558	586	614	642	670	698	703
24	497	525	553	581	609	637	665	693	697
23	491	519	547	575	603	630	658	686	691
22	484	512	540	568	596	624	652	680	684
21	477	505	533	561	589	617	645	673	677
20	470	498	526	553	581	609	637	665	670
19	462	490	518	546	574	602	630	658	662
18	453	481	509	537	565	593	621	649	653
17	445	473	500	528	556	584	612	640	645
16	435	463	491	519	547	575	603	631	635
15	426	454	482	510	538	566	593	621	626
14	416	443	471	499	527	555	583	611	615
13	405	433	461	489	517	545	573	601	605
12	394	422	450	478	506	534	562	590	594
11	382	410	438	466	494	522	550	578	582
10	371	399	427	455	483	510	538	566	570
9	358	386	414	442	470	498	526	554	558
8	345	373	401	429	457	485	513	541	545
7	332	360	388	416	444	472	500	528	532
6	319	347	375	403	431	458	486	514	518
5	305	332	360	388	416	444	472	500	504
4	290	318	346	374	402	430	458	486	489
3	275	303	331	359	387	415	443	471	474
2	260	287	315	343	371	399	427	455	458
1	244	272	300	328	356	384	412	439	442
0	227	255	283	311	339	367	395	423	426
P*	130	140	150	160	169	179	189	199	200

* = Paralegals/Law Clerks

Published by the U.S. Attorney's Office for the District of Columbia, Civil Division

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared to assist with resolving requests for attorney's fees in complex civil cases in District of Columbia federal courts handled by the Civil Division of the United States Attorney's Office for the District of Columbia. It has been developed to provide "a reliable assessment of fees charged for complex federal litigation in the District [of Columbia]," as the United States Court of Appeals for the District of Columbia Circuit urged. *DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, nor has it been adopted by other Department of Justice components.

2. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *E.g.,* 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b). A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). The matrix is not intended for use in cases in which the hourly rate is limited by statute. *E.g.*, 28 U.S.C. § 2412(d).

3. For matters in which a prevailing party agrees to payment pursuant to this fee matrix, the United States Attorney's Office will not request that a prevailing party offer the additional evidence that the law otherwise requires. *See, e.g., Eley v. District of Columbia*, 793 F.3d 97, 104 (D.C. Cir. 2015) (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'")).

4. The years in the column on the left refer to an attorney's years of experience practicing law. Normally, an attorney's experience will be calculated based on the number of years since an attorney graduated from law school. If the year of law school graduation is unavailable, the year of bar passage should be used instead. Thus, an attorney who graduated from law school in the same year as the work for which compensation is sought has 0 years of experience. For all work beginning on January 1 of the calendar year following graduation (or bar admission), the attorney will have 1 year of experience. (For example, an attorney who graduated from law school on May 30 will have 0 years of experience until December 31 of that same calendar year. As of January 1, all work charged will be computed as performed by an attorney with 1 year of experience.) Adjustments may be necessary if an attorney did not follow a typical career progression or was effectively performing law clerk work. *See, e.g., EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate).

5. The data for this matrix was gathered from the dockets of cases litigated in the U.S. District Court for the District of Columbia using the following search in Bloomberg Law: keywords ("motion n/5 fees AND attorney!" under "Dockets Only") + filing type ("brief," "motion," or "order") + date ("May 31, 2013 – May 31, 2020" under "Entries (Docket Key Only)"). This returned a list of 781 cases. Of those, cases were excluded if there was no motion for fees filed, the motions for fees lacked necessary information, or the motions involved fees not based on hourly rates, involved rates explicitly or implicitly based on an existing fee matrix, involved rates explicitly or implicitly subject to statutory fee caps (e.g., cases subject to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)), or used lower rates prescribed by case law (*e.g.*, *Eley*, 793 F.3d at 105 (Individuals with Disabilities in Education Act

cases)). After these excisions, 86 cases, many of which included data for multiple billers (and 2 of which only provided hourly rate data for paralegals), remained.

6. The cases used to generate this matrix constitute complex federal litigation—which caselaw establishes as encompassing a broad range of matters tried in federal court. *E.g.*, *Reed v. District of Columbia*, 843 F.3d 517, 527-29 (D.C. Cir. 2016) (Tatel, J., concurring) (noting that cases arising under the Freedom of Information Act, Title VII, the Americans with Disabilities Act, Constitutional Amendments, antitrust statutes, and others have been deemed complex, and even "relatively small" cases can constitute complex federal litigation, as they too require "specialized legal skills" and can involve "complex organizations," such as "large companies"); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 14-16, 17 (D.D.C. 2008) (prevailing market rates for complex federal litigation should be determined by looking to "a diverse range of cases"). That the attorneys handling these cases asked the court to award the specified rates itself demonstrates that the rates were "'adequate to attract competent counsel, [while] not produc[ing] windfalls to attorneys.'" *West v. Potter*, 717 F.3d 1030, 1033 (D.C. Cir. 2013) (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984)). As a consequence, the resulting analysis yields the "prevailing market rate[] in the relevant community" for complex litigation undertaken in federal courts in the District of Columbia. *See Blum*, 465 U.S. at 895.

7. From these 86 complex federal cases, the following information was recorded for 2013 and beyond: hourly rate, the calendar year the rate was charged, and the number of years the lawyer was out of law school when the rate was charged (or, if law school graduation year was unavailable, years since bar passage), as defined above. If the graduation or bar passage year was not stated in a motion or its exhibits, then the lawyer's biography was researched on the internet. Although preexisting fee matrices for the District of Columbia provide for mid-year rate changes, very few lawyers in the data submitted rates that changed within a calendar year. For this reason, the matrix was modeled using one rate for each calendar year. On the occasions when a lawyer expressed an hourly rate as a range or indicated the rate had increased during the year, the midpoint of the two rates was recorded for that lawyer-year.

8. The matrix of attorney rates is based on 675 lawyer-year data points (one data point for each year in which a lawyer charged an hourly rate) from 419 unique lawyers from 84 unique cases. The lawyer-year data points spanned from years 2013 to 2020, from $100 to $1250, and from less than one year of experience to 58 years.

9. Paralegal/law clerk rates were also recorded. The following titles in the fee motions were included in the paralegal/law clerk data: law clerk, legal assistant, paralegal, senior legal assistant, senior paralegal, and student clerk. The paralegal/law clerk row is based on 108 paralegal-year data points from 42 unique cases. They spanned from 2013 to 2019 and from $60 to $290. (It is unclear how many unique persons are in the 108 data points because paralegals were not always identified by name.)

10. The matrix was created with separate regressions for the lawyer data and the paralegal data. For the paralegal data, simple linear least-squares regression was used with the dependent variable hourly rate and the independent variable the year the rate was charged subtracted from 2013; years were

combined into one variable and subtracted from 2013 rather than modeled as separate indicator variables to constrain annual inflation to a constant, positive number. The resulting regression formula was rate = 129.8789 + 9.902107 * (year-2013). For the lawyer data, least-squares regression was used with the dependent variable hourly rate and independent variables the year the rate was charged and the number of years of experience of the lawyer when the rate was charged. The year the rate was charged was subtracted from 2013 and modeled linearly as with the paralegal data. The number of years out of law school (or since year of bar passage) was modeled with both linear and squared terms, as is common in labor economics to account for non-linear wage growth (e.g., faster growth earlier in one's career than at the end of one's career). *See, e.g.*, Jacob Mincer, *Schooling, Experience, and Earnings* (1974). The resulting regression formula was rate = 227.319 + 16.54492 * experience - 0.2216217 * experience ^ 2 + 27.97634 * (year-2013). Regressions were also run with log transformed rates and with a random-effect model (to account for several lawyers appearing more than once in the data), but both alternatives resulted in mostly lower rates than those reflected here; in order to minimize fee disputes, these models were therefore rejected in favor of the more generous untransformed, fixed-effect model. Rates from one case comprised 20% of the data; the regression was also run without that case, but the resulting rates were mostly lower and therefore rejected, again to minimize fee disputes.

11. The data collected for this matrix runs through 2020. To generate rates in 2021, an inflation adjustment (rounded to the nearest whole dollar) was added. The United States Attorney's Office determined that, because courts and many parties have employed the legal services index of the Consumer Price Index to adjust attorney hourly rates for inflation, this matrix will do likewise. *E.g.*, *Salazar v. District of Columbia*, 809 F.3d 58, 64-65 (D.C. Cir. 2015); *Eley*, 793 F.3d at 101-02; *DL*, 924 F.3d at 589-90.

12. This matrix was researched and prepared by Brian Fitzpatrick, the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School, with the help of his students.

EXHIBIT E

Home (/) / News (/news/)

Recent News (/news)

Ingrid Brunk Testifies to European Central Bank at ECB Legal Conference 2023 (https://law.vanderbilt.edu/news/ingrid-brunk-testifies-to-european-central-bank-at-ecb-legal-conference-2023/)

James F. Blumstein Files Amicus Brief in Robinson v. Ardoin

Fee matrix developed by Professor Brian Fitzpatrick and Brooke Levy '22 adopted by Federal Court

Feb 7, 2023

The Chief Judge of the U.S. District Court for the District of Columbia, Beryl A. Howell, ordered a plaintiff to recalculate and resubmit her claim for attorneys' fees using the so-called "Fitzpatrick Matrix (https://law.vanderbilt.edu/files/publications/usao_matrix_2015_-_2020.pdf)" on Jan. 23, marking the successful launch of a new tool developed for the Department

(https://law.vanderbilt.edu/news/james-f-blumstein-files-amicus-brief-in-robinson-v-ardoin/)

First Amendment Clinics Advocate for Right to Access Government Social Media Accounts
(https://law.vanderbilt.edu/news/first-amendment-clinics-advocate-for-right-to-access-government-social-media-accounts/)

A Novel Approach to Teaching Technology Law
(https://law.vanderbilt.edu/news/a-novel-approach-to-teaching-technology-law/)

Vanderbilt Law Students and Graduates Secure 39 Clerkships in the 2022-23 Academic Year
(https://law.vanderbilt.edu/news/vanderbilt-law-students-and-graduates-secure-39-clerkships-in-the-2022-23-academic-year/)

of Justice by complex litigation expert Brian Fitzpatrick (https://law.vanderbilt.edu/bio/brian-fitzpatrick), who holds the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School.

Brian Fitzpatrick

Fitzpatrick has published research on attorney compensation and fee awards throughout his career and often provided expert-witness testimony in cases where fee awards are at issue. In 2020, Peter C. Pfaffenroth of the U.S. Attorney's Office for the District of Columbia asked him to take on a daunting task for which Pfaffenroth believed Fitzpatrick was uniquely qualified: Update the venerable Laffey Matrix (http://www.laffeymatrix.com/), a chart that successful federal litigants had used to calculate and claim reimbursement for their legal fees in the District of Columbia since 1983.

"If you sue the federal government and win, you may be able to file a claim to be reimbursed for your attorneys' fees," Fitzpatrick explains. "But the matrix they were using to calculate these fee awards was 40 years old. Most law firms weren't even

Publications

Vanderbilt Law Review
(http://www.vanderbiltlawreview.org/)

Journal of Transnational Law
(http://www.vanderbilt.edu/jotl/)

Environmental Law & Policy Annual Review (ELPAR)
(/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/index.php)

Journal of Entertainment & Technology Law
(http://jetlaw.org/)

Apply Now (/prospective-students/admissions/apply/)

Make a Gift (https://vanderbilt.alumniq.com/giving/to/lawsch?appealCode=LEWH)

using computers in 1983 when the Laffey Matrix was developed, but for years it and another matrix from the 1980s were the only games in town for calculating fee awards. I was asked to develop an updated matrix that reflected modern realities."

Fitzpatrick volunteered to do the work pro bono if the DOJ would fund a research assistant. He hired **Brooke Levy '22**, to conduct a comprehensive audit of recent fee petitions in the D.C. District Court.

"Brooke went into the federal courts' electronic docketing system and examined every fee petition filed between 2013 and 2020. In cases where lawyers put in the hourly rates they actually charged the client for their work, we pulled that out and put it in a spreadsheet," he said. "That allowed us to determine the real hourly rates charged in the market."

Fitzpatrick presented the updated matrix to the Department of Justice in late 2021. The chart, which provides fees for attorneys according to their years of experience as well as hourly rates for law clerks and paralegals, was promptly dubbed the "Fitzpatrick Matrix" by DOJ staff.

"My goal was to develop a reliable assessment of fees charged for complex federal litigation that both plaintiffs and judges could use to evaluate fee claims," he said.

The advantage of having a modern, objective tool to calculate attorney's fees is clear in the order (https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2019cv00989/206139/68/) Chief Judge Howell handed down, in which she ordered a plaintiff to use the Fitzpatrick Matrix to calculate the attorneys' fees she was owed. The plaintiff had filed a claim for fees of approximately $415,000, but according to Judge Howell's calculations, "reasonable fees" at the hourly rates set forth in the Fitzpatrick Matrix indicated a fee award of approximately $245,000.

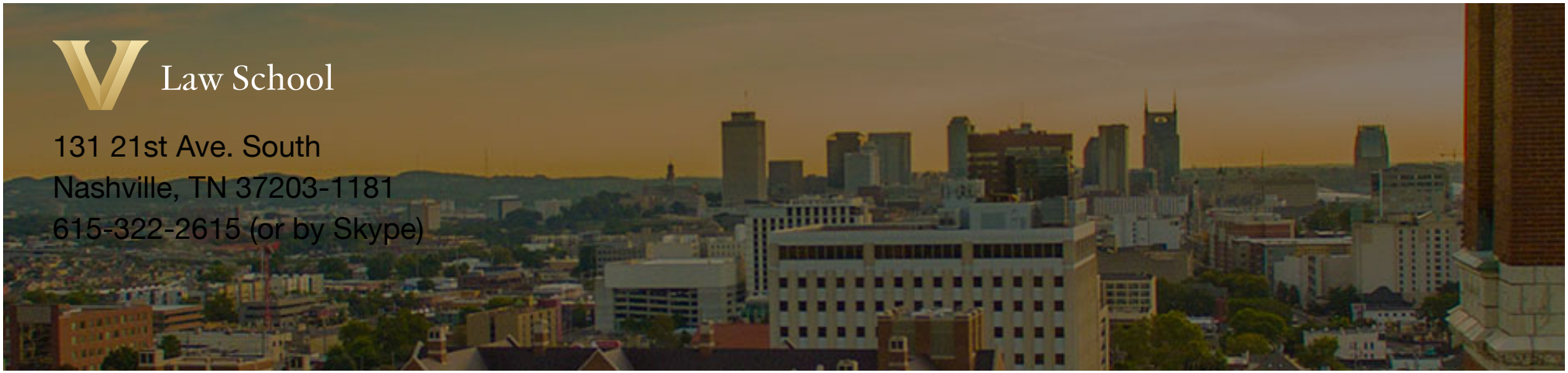
Attorneys representing the government wrote in a court filing that the Fitzpatrick Matrix is "accurate and reliable," noting that since the DOJ adopted it, "disputes about hourly rates have been minimized, both in settlement discussions and in fee

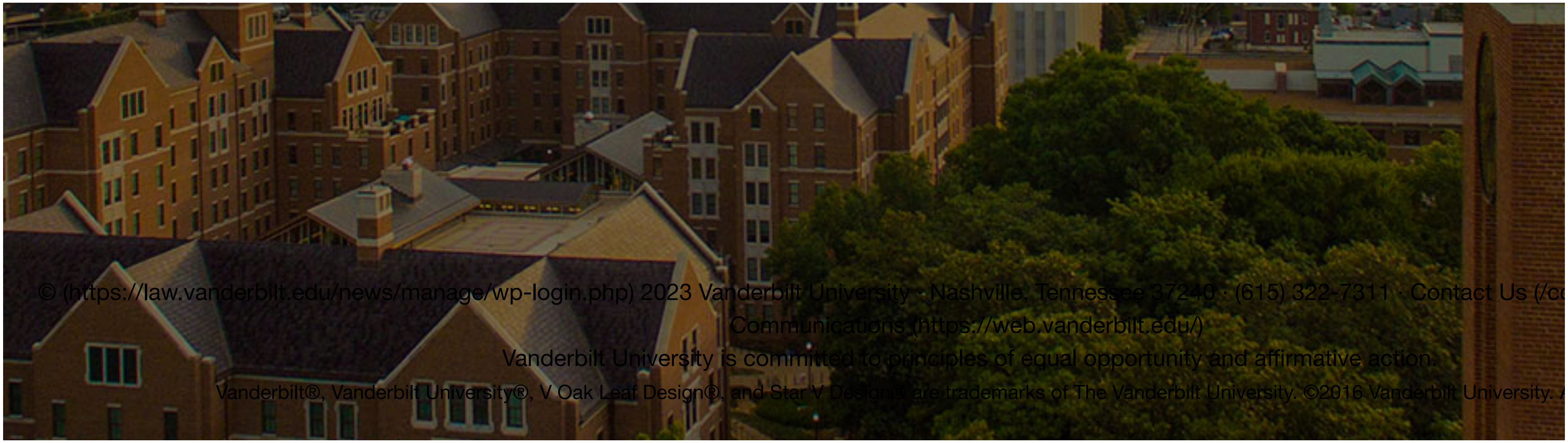
petitions."

Fitzpatrick hopes his new matrix will streamline the process for such claims in the future. "The matrix provides objective criteria for determining attorneys' fees based on prevailing rates and the attorneys' experience, so it should simplify the process for filing claims and require less judicial review," he said.

While the Fitzpatrick Matrix can be adjusted upward for inflation, Fitzpatrick recommends that it be more comprehensively updated every five years. "We shouldn't wait another 40 years to update this tool," he said.

Alumni (https://law.vanderbilt.edu/news/section/alumni/)
Branstetter Litigation and Dispute Resolution Program (https://law.vanderbilt.edu/news/section/branstetter/) **Faculty News** (https://law.vanderbilt.edu/news/section/faculty-news/) **General News** (https://law.vanderbilt.edu/news/section/general-news/) **Home Page News** (https://law.vanderbilt.edu/news/section/home-page-news/) **L&G News and Events** (https://law.vanderbilt.edu/news/section/law-government/)





© (https://law.vanderbilt.edu/news/manage/wp-login.php) 2023 Vanderbilt University · Nashville, Tennessee 37240 · (615) 322-7311 · Contact Us (/co
Communications (https://web.vanderbilt.edu/)
Vanderbilt University is committed to principles of equal opportunity and affirmative action.
Vanderbilt®, Vanderbilt University®, V Oak Leaf Design®, and Star V Design® are trademarks of The Vanderbilt University. ©2016 Vanderbilt University. A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL-APPROVAL HEARING IN *NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA*

WRITTEN STATEMENT OF ERIC ALAN ISAACSON
OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023,
FINAL-APPROVAL HEARING IN
NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL.
V. UNITED STATES OF AMERICA

I am a class member in the above-captioned action who on September 12, 2023, timely served and submitted my Objection of Eric Alan Isaacson to Proposed Settlement in *National Veterans Legal Services Program, et al. v. United States of America.*

On October 3, 2023, Class Counsel filed, but did not serve on me, Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Fees, Costs and Service Awards. DE160. Class Counsel's reply states that I have said I "intend[] to appear remotely" at the October 12, 2023, hearing. DE160:2. That is not accurate. The Objection and Declaration that I submitted on September 12, 2023, states that "I desire to be heard at the October 12, 2023, Final Approval

Hearing in the above-captioned matter, either in person or remotely by means of telephone or video conference." DE160:22¶27.

This Court's Order Setting Settlement Hearing Procedures, DE162, which was filed on October 4, 2023, but was not served on me by the Court or by any party, makes clear that I will need to appear at the hearing in person. That Order states that "[d]ue to technology constraints, those participating virtually will not be able to present any exhibits or demonstratives to the Court or view any that are physically displayed in the courtroom during the hearing." DE162:2¶1. That Order further states that "[i]f a Class Member has submitted a written statement and wishes to be heard at the Settlement Hearing, the Class Member shall be allocated ten minutes to make their presentation," DE162:2¶2.b.i., while any Class Member who "has not submitted a written statement but wishes to be heard at the Settlement Hearing," will be allocated only "five minutes to make their presentation." DE162:3¶2.ii.

I am accordingly submitting this written statement, and am hereby give notice that I will be appearing in person. In addition to expanding on the points made in the Objection and supporting Declaration that I submitted on September 12, 2023, I intend to make the following points:

I will object that class members, such as myself, who submitted timely objections have not been served by the Court or by the Settling Parties with Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Fees, Costs and Service Awards, DE160, or with this Court's orders changing the location of the Final Approval Hearing, DE161, and imposing limitations and additional requirements on those who seek to participate in that hearing. DE162.

I will further object that class members' objections and supporting documentation have not, to date, been placed on the District Court's docket as part of the public record in this case. Although I timely served and submitted my Objection and supporting Declaration as directed in the class notice, both sending it both by email and by U.S. Postal Service Express Mail addressed to the Honorable Paul L. Friedman, my Objection has never been filed on the District Court's

public PACER-accessible docket for this case. Neither have the objections of any other class members.

In my decades of legal practice connected with class actions and their settlement, I have never before witnessed a case in which the settling parties arranged with the court to keep class members' objections off the public record. This is a gross violation of the First Amendment and common-law rights of public access to court records. "[I]n class actions—where by definition 'some members of the public are also parties to the [case]'—the standards for denying public access to the record 'should be applied ... with particular strictness.'" *Shane Grp., Inc. v. Blue Cross Blue Shield,* 825 F.3d 299, 305 (6th Cir.2016)(quoting *In re Cendant Corp.,* 260 F.3d 183, 194 (3d Cir. 2001)). It also amounts to a denial of due process, obviously impairing objecting class members' ability to seek appellate review.

I also will object to Class Counsel's submission of supplemental expert declarations supporting their fee application as a violation of Rule 23(h), which required them to file their fee motion with supporting affidavits and evidence well before the deadline for class members to file objections. *See* Fed.R.Civ.P. 23(h); *Johnson v. NPAS Solutions, LLC,* 975 F.3d 1244, 1252 (11th Cir. 2020); *Redman v. RadioShack Corp.,* 768 F.3d 622, 638 (7th Cir. 2014); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-95 (9th Cir.2010). This breach implicates fundamental due-process concerns. *See Lawler v. Johnson,* 253 So.3d 939, 948-51 (Ala. 2017).

The Declaration of William Rubenstein, DE160-2, was submitted on October 3, 2023, well after both the August 28, 2023, deadline this Court set for Class Counsel's attorney's fee application, and weeks after the September 12, 2023, deadline for filing objections. Although I had submitted a timely objection, to which Professor Rubenstein's declaration responds, the Rubenstein declaration was not even served on me. Rubenstein's new declaration provides foundational evidence for Class Counsel's fee request long after the relevant deadlines: "I provide the Court with empirical data which would enable it to find that Class Counsel's proposed billing rates are reasonable." DE160-2:¶1.

Rubenstein's analysis not only comes too late, it is plainly unreliable.

Deconstructing Fitzpatrick's Matrix, Professor Rubenstein says that "[t]he 8 class actions" the Fitzpatrick Matrix includes "had, on average, more than 12 times as many docket entries as the non-class action cases." DE160-2:2¶1. He fails to observe that this makes them a poor comparison for this case, in which the docket entries totaled only 141 with the filing of the Settling Parties' proposed Settlement on October 11, 2022. DE141. According to Rubenstein, the great majority of the cases in the Fitzpatrick Matrix are inapposite, because "in the 74 non-class action cases, the mean" number of docket entries "is 100 entries per case." DE160-2:15-16¶21. "By contrast," Rubenstein says, "the average number of docket entries in the 8 class action cases is 1,207, with the median at 884." DE160-2:16¶21. It should be clear, however, that this case—with around 160 docket entries—is much closer to the relatively simple cases that Rubenstein contends warrant lower attorney's fees, than it is to the class actions that Rubenstein contends warranted higher fees.

"Most importantly," Rubenstein adds, the hourly rates in the Matrix's 8 class action cases were roughly 44% higher than the hourly rates in its non-class action cases." DE160-2. Rubenstein does not, however, explain why class members should have to pay so much more. If anything, Rubenstein's presentation suggests that class-action lawyers are systematically overpaid. Yet Rubenstein contends that Class Counsel in this case should receive nearly ten percent more than do counsel in other, genuinely complex, large-fund class actions: "Class Counsel's trend line is on average 9.3% above the trend line for rates in fee petitions approved in other large fund class actions." DE160-2:13-14¶18.

The cases that Rubenstein selects as comparators are obviously inapposite. In *Cobdell v. Salazar,* for example, the district court conducted a full bench trial, and the Final Order Approving Settlement was docket entry 3850. *Cobell v. Jewell,* 234 F. Supp. 3d 126, 130 (D.D.C. 2017), *aff'd sub nom. Cobell v. Zinke,* 741 F.App'x 811 (D.C. Cir. 2018). In *Mercier v United States,* Fed.Cl. No. 1:12-cv-00920, moreover, the plaintiffs' lawyers achieved a far better result than the meagre 25% recovery in this case: "The Gross Settlement Fund of $160,000,000, according to Plaintiffs' damages expert, represents slightly more than 65% of the maximum amount Plaintiffs could have recovered if they had prevailed at trial." *Mercier v. United States,* 156 Fed.Cl. 580, 584 (2021).

Plaintiffs' expert in *Mercier,* Brian T. Fitzpatrick, recommended a 30% fee award, but the Court of Claims concluded that was far too much: "An award of 30% ... yields a windfall to counsel, is not necessary to attract competent counsel to similar cases, and would necessarily be at the expense of the class members." *Mercier v. United States,* 156 Fed. Cl. 580, 592 (2021). The Court of Claims explained that "[t]he fees class counsel requests are approximately 4.4 times the estimated lodestar amount ($10,831,372)." *Id.* That was simply too much. *See id.* Thus, even the cases relied on by Professor Rubenstein demonstrate that the percentage fee award sought by Class Counsel in this case, producing a multiplier of four or 5.5 times their lodestar, amounts to an impermissible windfall.

The Supplemental Declaration of Brian T. Fitzpatrick, DE160-1, also was submitted on October 3, 2023, well after both the August 28, 2023, deadline this Court set for Class Counsel's attorney's fee application, and the September 12, 2023, deadline for submitting objections. Although I had submitted a timely objection, to which Professor Fitzpatrick's supplemental declaration responds, his supplemental declaration was not even served on me.

Remarkably, the untimely declaration signed by Professor Rubenstein attacks the reliability of Professor Fitzpatrick's methodology in constructing the Fitzpatrick Matrix, implicitly suggesting that Professor Fitzpatrick fits his conclusions to the desires of those who pay him. *See, e.g.,* DE160-2:19¶25&n.29. That is a practice with which Professor Rubenstein is very familiar. His treatise on class actions not so long ago recognized that incentive awards were created of "whole cloth," and that "incentive awards threaten to generate a conflict between the representative's own interests and those of the class she purports to represent." 5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015). The Eleventh Circuit naturally quoted Rubenstein's treatise to strike down incentive awards as contrary to law: ""Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards.'" *Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1259 (11th Cir. 2020)(quoting Rubenstein, *supra,* § 17:4.). But the class-action plaintiffs' lawyers who frequently pay him to submit favorable declarations complained, and Professor Rubenstein swiftly changed his tune—

submitting an amicus brief supporting en banc rehearing in *Johnson v. NPAS Solutions* that in effect repudiated his own treatise. Professor Rubenstein then rewrote the treatise to suit their ends. Compare 5 William B. Rubenstein, *Newberg on Class Actions* §17:1 at 492 (5th ed. 2015), attached as Exhibit A hereto, which is sensibly hostile to incentive awards, with Professor Rubenstein's amicus brief in *Johnson v. NPAS Solutions,* attached as Exhibit B hereto, and with the newly minted Sixth Edition of Rubenstein's treatise, now arguing for incentive awards.

In a similar vein, I doubt that Professor Fitzpatrick has ever come across a class-action plaintiffs' attorney's fee application that he would characterize as excessive. His position is well known. In one of his law-review articles, Fitzpatrick argues that "class action lawyers not only do not make too much, but actually make too little. Indeed, I argue that in perhaps the most common class action—the so-called 'small stakes' class action—it is hard to see, as a theoretical matter, why the lawyers should not receive everything and leave nothing for class members at all." Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. 2043, 2044 (2010). Professor Fitzpatrick explains:

> I assert that we should not be concerned about compensating class members in small-stakes class actions and, instead, should be concerned only with fully incentivizing class action lawyers to bring as many cost-justified actions as possible. That is, the deterrence-insurance theory of civil litigation suggests that the optimal award of fees to class action lawyers in small-stakes actions is 100% of judgments. It is for this reason that I believe class action lawyers are not only not making too much, but, rather, making too little—far too little.

Fitzpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. at 2047. Professor Fitzpatrick writes that "even if judges cannot award 100% of settlements to class action lawyers due to political or legal constraints," he believes "they should award fee percentages as high as they can." Fitpatrick, *Do Class Action Lawyers Make Too Little?,* 158 U.Pa.L.Rev. at 2048.

With that, I respectfully submit, the Fitzpatrick and Rubenstein declarations should be rejected as biased, unreliable, and at odds with Rule 23 principles. To place reliance on their conclusions would be to breach this Court's fiduciary duty to the Class.

I also wish to express concerns about this Court's October 4, 2023, Order Setting Settlement Hearing Procedures, which was not served on me, but which I have downloaded from PACER. First, I note that the Order is structured to have settlement approval presented first, with objectors given only a brief opportunity to speak, with only the parties, and not the objectors, then given an opportunity to address attorney's fees. *See* DE162:2-3. This suggests that the Court regards settlement approval as a *fait accompli*. The assumption that objecting class members need not be heard on the subject of attorney's fees also ignores the fact that 2018 amendments to Rule 23(e) make the consideration of attorney's fees a critical element to be considered in connection with whether to approve a settlement in the first place. The current Rule 23(e)(2) says the Court may approve a class-action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether … (C) the relief provided for the class is adequate, taking into account … (iii) the terms of any proposed award of attorney's fees, including timing of payment." Fed.R.Civ.P. 23(e)(2)(C)(iii). Considering attorney's fees only after considering settlement approval, and excluding objectors from commenting in the portion of the hearing concerning attorney's fees, is inconsistent with Rule 23 itself, as well as with principles of fundamental due process.

Also of concern, the schedule in the October 4 Order appears to give objectors no opportunity to cross examine Class Counsel's expert witnesses, Professors Fitzpatrick and Rubenstein. If their opinions are not tested by cross examination, their declarations not only should be discounted as unreliable, they should be stricken as untested and inadmissible hearsay.

On whole, it does not appear that the proceedings are structured to comply with the due-process requirement that objectors receive a full opportunity to be heard. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12 (1985).

DATED: October 11, 2023

Respectfully submitted,

Eric Alan Isaacson

LAW OFFICE OF ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231
Telephone: (858)263-9581
Email: ericalanisaacson@icloud.com

EXHIBIT A

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 5
Chapters 15 to 17

William B. Rubenstein
Sidley Austin Professor of Law
Harvard Law School

THOMSON REUTERS™

For Customer Assistance Call 1-800-328-4880

Mat #41621726

© 2015 Thomson Reuters

For authorization to photocopy, please contact the **Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Nothing contained herein is intended or written to be used for the purposes of 1) avoiding penalties imposed under the federal Internal Revenue Code, or 2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Acknowledgment

I continue to be blessed by the assistance of remarkable Harvard Law students, without whom this Treatise endeavor would not be possible. Three graduating students—Todd Logan, Rachel Miller-Ziegler, and Shiyu (Vic) Xu, all Harvard Law School Class of 2015, a veritable "dream team" of research assistants—spent much of the spring of their 3L year helping me finish this volume, each contributing unique talents. Three rising 3Ls—Ephraim McDowell, Albert Rivero, and Ben Schwartz, all Harvard Law School Class of 2016 —continued to help in numerous ways throughout their 2L year. And two 1Ls—John Bailey and Mengjie Zou, Harvard Law School Class of 2017—spent portions of their 1L spring and summer helping me put the finishing touches on this volume. If all that were not blessing enough, Kyle Dandelet, Harvard Law School Class of 2010, came out of retirement to assist with the editing of Volume 5. Numerous other students undertook research and writing that is acknowledged throughout the volume.

Harvard Law School continues to support my scholarship with funding for research assistants and summer writing. I am grateful for that support, as well as for the continuing intellectual companionship of so many of my colleagues, but especially that of my Dean, Martha Minow, and colleagues Noah Feldman, Jerry Frug, and John Goldberg. Carol Bateson provides great support.

I remain grateful to my father, and to my friends Peter Eliasberg and Seana Shiffrin, who—without complaint—hear far more about class action law than life should require.

William B. Rubenstein
Cambridge, Massachusetts
July 2015

Chapter 17

Incentive Awards*

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

*Professor Rubenstein thanks Shiyu (Vic) Xu, Harvard Law School Class of 2015; Ephraim McDowell, Harvard Law School Class of 2016; and John Bailey and Mengjie Zou, Harvard Law School Class of 2017, for their help in editing this unit.

Case: 24-10775 Document: 32-3 Page: 193 Filed: 12/06/2024 (193 of 1275)
Case 1:16-cv-07775-PKC Document 166-6 Filed 10/14/23 Page 1 of 144

§ 17:1 Incentive awards—Generally

A class action lawsuit is a form of representative litigation—one or a few class members file suit on behalf of a class of absent class members and pursue the class's claims in the aggregate.[1] At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.[2] Most courts call that payment an "incentive award," though some courts label it a "service award" or "case contribution award."[3] The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function. Empirical evidence shows that incentive awards are now paid in most class suits and average between $10–15,000 per class representative.[4]

Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth, yet both judges—and Congress—have expressed concerns about them. The concerns center on the fact that incentive awards have the potential to interfere with a class representative's ability to perform her job adequately. That job is to safeguard the interests of the absent class members. But with the promise of a significant award upon settlement of a class suit, the representative might prioritize securing that payment over serving the class. Thus, incentive awards threaten to generate a conflict between the representative's own interests and those of the class she purports to represent.

Accordingly, the propriety of incentive awards to named

[Section 17:1]

[1]Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members . . .").

[2]Other class members may also be eligible for such awards. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[3]For a discussion of the history and nomenclature of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[4]For a discussion of empirical data on the frequency and size incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 17:7 to § 17:8 (5th ed.).

Appx4561

plaintiffs has been rigorously debated[5] and the law concerning incentive awards is surprisingly nuanced. The following sections of the Treatise attempt to untangle the issues. They proceed to cover the following issues:

- the history and nomenclature of incentive awards;[6]
- the rational for incentive awards;[7]
- the legal basis for incentive awards;[8]
- the source of incentive awards;[9]
- the eligibility requirements for incentive awards;[10]
- the frequency[11] and size of incentive awards;[12]
- the judicial review process, including the timing of the motion;[13] the burden of proof;[14] documentation requirements;[15] standards by which courts assess proposed awards;[16] and disfavored practices with regard to incentive awards, including conditional incentive awards,[17] percentage-based incentive awards,[18] *ex ante* incentive awards agreements,[19] and excessive incentive awards;[20]
- the Private Securities Litigation Reform Act of 1995

---

[5]Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) (quoting **Newberg on Class Actions**).

Lane v. Page, 862 F. Supp. 2d 1182, 1237, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) (quoting **Newberg on Class Actions**).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *6 (D.N.M. 2011) (quoting **Newberg on Class Actions**).

Estep v. Blackwell, 2006 WL 3469569, *6 (S.D. Ohio 2006) (quoting **Newberg on Class Actions**).

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[8]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:5 (5th ed.).

[10]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:7 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[13]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:10 (5th ed.).

[14]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:11 (5th ed.).

[15]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[16]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[17]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:15 (5th ed.).

[18]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:16 (5th ed.).

[19]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

[20]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

(PSLRA)'s approach to incentive awards;[21]
- the availability of incentive awards for objectors;[22] and
- the process for appellate review of incentive awards.[23]

§ 17:2 History and nomenclature of incentive awards

Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth. The threads initially appear in the reported case law in the late 1980s:[1] a 1987 decision of a federal court in Philadelphia appears to be the first to employ the term "incentive award."[2] That court stated the following:

> In addition to the petition for attorneys fees, plaintiffs counsel have requested that the court award incentive payments to the named plaintiffs, in this litigation in excess of their recovery as class plaintiffs in recognition of their role as private attorneys general in this litigation. Counsel has indicated that the named plaintiffs . . . have helped to effectuate the policies underlying the federal securities laws by instituting this litigation, by monitoring the progress of the litigation and undertaking the other responsibilities attendant upon serving as class representatives. Plaintiffs brought to the attention of counsel the existence of facts which culminated in this law suit and have sought through counsel and obtained substantial compensation for the alleged injuries suffered as a result of the alleged wrongful acts of the defendants. Plaintiffs' counsel have provided numerous citations in this district, in this circuit and elsewhere, in which substantial incentive pay-

---

[21] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[22] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:20 (5th ed.).

[23] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:21 (5th ed.).

[Section 17:2]

[1] Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310–11 (2006) ("Courts once tended to limit incentive awards to cases where the representative plaintiff had provided special services to the class—for example, providing financial or logistical support to the litigation or acting as an expert consultant. Beginning around 1990, however, awards for representative plaintiffs began to find readier acceptance . . . By the turn of the century, some considered these awards to be 'routine.'" (footnotes omitted) (quoting Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N.D. Ga. 2001))).

[2] Re Continental/Midlantic Shareholders Litigation, 1987 WL 16678 (E.D. Pa. 1987).

ments to named plaintiffs in securities class action cases have been made. I believe that such payments are appropriate in this case as well, and will award $10,000.00 payments to both named plaintiffs.[3]

This passage is remarkable in three regards. *First*, as noted, it is the first reference to incentive awards in the reported case law, yet the court states that counsel had provided "numerous citations . . . in which substantial incentive payments to named plaintiffs in securities class action cases have been made." This implies that a practice of incentive awards pre-dated courts' references to such awards. There are, in fact, smatterings of earlier cases providing special awards to plaintiffs without labeling them incentive awards.[4] *Second*, the $10,000 payment in 1987, when adjusted to 2002 dollars to accord with an empirical study on point, shows the award to be about $15,830, which the empirical study reports is almost precisely the average incentive award 15 years later.[5] *Third*, although labeling the payment an "incentive award," the rationale that the court employs speaks more to compensation than incentive, suggesting that the class representatives are being paid for their service to the class, not so as to ensure that class members will step forward in the future.

Perhaps for that reason, some courts refer to the awards as "service awards."[6] The first appearance of this term oc-

---

[3]Re Continental/Midlantic Shareholders Litigation, 1987 WL 16678, *4 (E.D. Pa. 1987).

[4]*See, e.g.,* Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.), 59 F.R.D. 616, 617, 6 Fair Empl. Prac. Cas. (BNA) 925, 6 Empl. Prac. Dec. (CCH) P 8935 (W.D. Pa. 1973), judgment aff'd, 494 F.2d 799, 7 Fair Empl. Prac. Cas. (BNA) 822, 7 Empl. Prac. Dec. (CCH) P 9269 (3d Cir. 1974) (approving settlement that provided "special awards in the aggregate amount of $17,500 to those members of the plaintiff class who were most active in the prosecution of this case and who devoted substantial time and expense on behalf of the class").

[5]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1308 (2006) (reporting average award per class representative is $15,992 in inflation adjusted 2002 dollars).

For a discussion of how the magnitude of incentive awards has varied over time, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[6]Viafara v. MCIZ Corp., 2014 WL 1777438, *16 (S.D.N.Y. 2014) ("Ser-

curs around 2002[7] and there are about 250 uses of it in federal case law thereafter,[8] though only one by an appellate court.[9] By contrast, about 1,000 district and appellate decisions employ the term "incentive award."[10] The courts appear to utilize the terms interchangeably.

Other courts refer to incentive awards as "case contribution awards."[11] The first case utilizing this term in the reported case law is a 2003 decision of the United States District Court for the Northern District of California. Therein, the court stated that:

> In order to compensate Class Representatives for their time and efforts with respect to this Action, the Class Representatives . . . hereby are awarded Case Contribution Compensation in the amount of $2,000 each, to be paid from the Settlement Fund.[12]

No court employed the case contribution locution again for

---

vice awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs.").

[7]In re Sorbates Direct Purchaser Antitrust Litigation, 2002 WL 31655191, *3 (N.D. Cal. 2002) ("Service awards to Class Representatives Nutri-Shield, Inc., Ohio Chemical Services, Inc., Chem/Serv, Inc., Universal Preservachem, Inc., Kraft Chemical Company Nutrishield etc. in the amount of $7,500 each shall be paid from the Settlement Funds.").

[8]A Westlaw search in the federal courts database for <adv: "service award!" /p ("class representative!" or "named plaintiff!")> returned 258 cases on June 1, 2015.

[9]Rodriguez v. National City Bank, 726 F.3d 372, 375, 86 Fed. R. Serv. 3d 414 (3d Cir. 2013) (noting that "the [settlement] agreement provided a service award of $7,500 to each of the named plaintiffs, $200 to each class payee, $75,000 to two organizations that would provide counseling and other services to the settlement class, and $2,100,000 in attorneys' fees").

[10]A Westlaw search in the federal courts database for <adv: "incentive award!" /p ("class representative!" or "named plaintiff!")> returned 930 cases on June 1, 2015.

[11]Joseph v. Bureau of Nat. Affairs, Inc., 2014 WL 5471125, *4 (E.D. Va. 2014) ("The Court finds that Case Contribution Awards of $5,000.00 each to Class Representatives . . . are just and reasonable, and fairly account for their contributions to the pursuit of this Action on behalf of the Settlement Class.").

[12]In re Providian Financial Corp., 2003 WL 22005019, *3 (N.D. Cal. 2003).

three years[13] and indeed that form is less often utilized than the phrase "incentive award." There are about 40 reported cases using a "case contribution" phrase[14] (again compared to close to 1,000 cases employing the term "incentive award") and no appellate court decisions utilizing that term. The courts appear to utilize the terms "incentive awards" and "case contribution awards" interchangeably, with no apparent difference in courts' treatment of the concept based on the utilization of one term or the other.

§ 17:3 Rationale for incentive awards

At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class.[1] Most courts call that payment an "incentive award," though some courts label it a "service award" or "case contribution award."[2] The names capture the sense that the payments aim to compensate class representatives for their service to the class and simultaneously serve to incentivize them to perform this function. Incentive awards for class representatives seem problematic because they appear to treat the class representative differently than the other members of the class. This is a problem for class action law because, generally speaking, a class representative is not entitled to be treated differently than any other class member in the settlement of the class suit.[3] As the Ninth Circuit explained in the context of a settlement that awarded

---

[13]In re Westar Energy, Inc. Erisa Litigation, 2006 WL 6909134, *4 (D. Kan. 2006) ("Each of the Named Plaintiffs is also awarded $1,000.00 for their case contribution.").

In re ADC Telecommunications ERISA Litigation, 2006 WL 6617080, *3 (D. Minn. 2006) (preliminarily approving proposed class action settlement that proposed "payment of the Named Plaintiffs' Case Contribution Compensation").

[14]A Westlaw search in the federal courts database for <adv: "case contribution" /p ("class representative!" or "named plaintiff!")> returned 39 cases on June 1, 2015.

[Section 17:3]

[1]Other class members may also be eligible for such awards. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[2]For a discussion of the history and nomenclature of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[3]Indeed, a class can only be certified if the class representative's claims are typical of those of the rest of the class. Fed. R. Civ. P. 23(a)(3).

some present plaintiffs more money than most absent class members:

> [S]pecial rewards for [class] counsel's individual clients are not permissible when the case is pursued as a class action. . . . [W]hen a person joins in bringing an action as a class action he has disclaimed any right to a preferred position in the settlement. Were that not the case, there would be considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.[4]

Courts fear that a class representative can be induced by a special payment to sell out the class's interests.[5] Such payments are therefore suspect and the suspicion is sometimes policed by ensuring that the class representative's remuneration from the settlement is the same as that of other class

---

[4]Staton v. Boeing Co., 327 F.3d 938, 976, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (citation omitted) (internal quotation marks omitted).

[5]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("[W]e have expressed a 'sensibl[e] fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.'" (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003))).

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("Yet applications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain." (citing **Newberg on Class Actions**))).

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 120 (E.D. Pa. 1994) (characterizing class representatives as "fiduciaries" of absent class members and stating that "[t]his fiduciary status introduces concerns about whether the payment of any 'awards' can be reconciled with the punctilio of fairness the fiduciary owes to the beneficiary").

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) ("A class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

Women's Committee For Equal Employment Opportunity (WC=EO) v. National Broadcasting Co., 76 F.R.D. 173, 180, 19 Fair Empl. Prac. Cas. (BNA) 1703, 15 Empl. Prac. Dec. (CCH) P 7832, 24 Fed. R. Serv. 2d 359 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.").

members.[6]

Given this emphasis, it is somewhat surprising that incentive awards have proliferated. The Sixth Circuit has observed that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design."[7] Yet courts have, in fact, given some attention to the rationale for incentive awards, noting that they work "[1] to compensate class representatives for work done on behalf of the class, [2] to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, [3] to recognize their willingness to act as a private attorney general."[8] Many courts have also noted a fourth rationale for incentive payments: that such payments do precisely what their name hopes they will—incentivize class members to step forward on behalf of the class. Courts regularly reference these four rationales behind incentive awards.

Compensation. Most courts state that an incentive award to the class representatives is meant to compensate those entities for the service that they provided to the class.[9] Generally, these services are the time and effort the class representatives invest in the case. Class representatives

---

[6]Lane v. Page, 862 F. Supp. 2d 1182, 1238, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) ("Courts 'have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit.' " (quoting **Newberg on Class Actions**)).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *8 (D.N.M. 2011) (quoting **Newberg on Class Actions**) (same).

[7]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[8]Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (numbers added).

See also Sullivan v. DB Investments, Inc., 667 F.3d 273, 333, 2011-2 Trade Cas. (CCH) ¶ 77736, 81 Fed. R. Serv. 2d 580 (3d Cir. 2011) ("The purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation and to reward the public service of contributing to the enforcement of mandatory laws." (citations omitted) (internal quotation marks omitted)).

[9]**First Circuit (District Court)**

Nilsen v. York County, 400 F. Supp. 2d 265 (D. Me. 2005) (approving "incentive awards to compensate the three class representatives and

seventeen class member who spent time working with class counsel to achieve the settlement").

Second Circuit (District Court)

In re American Intern. Group, Inc. Securities Litigation, 2012 WL 345509, *6 (S.D.N.Y. 2012) ("Courts . . . routinely award . . . costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation omitted) (internal quotation marks omitted)).

Third Circuit (District Court)

In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328) (Apr. 17, 2014) ("Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) ("The Court will compensate the class representatives for the time they spent on matters connected to the litigation in this case.").

Pozzi v. Smith, 952 F. Supp. 218, 227, Fed. Sec. L. Rep. (CCH) P 99422 (E.D. Pa. 1997) (awarding class representative fee of $1,600 to compensate the class representative for her actual time and expenses).

Lake v. First Nationwide Bank, 900 F. Supp. 726, 737 (E.D. Pa. 1995) (awarding class representative fee of $500 to both class representatives to compensate them for their actual time and expenses).

Fifth Circuit (District Court)

Burford v. Cargill, Inc., 2012 WL 5471985, *6 (W.D. La. 2012) ("[T]he Court finds that each named Plaintiff is entitled to an enhancement award to compensate him or her for the time and effort expended in representing the settlement class during this action.").

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 868, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) ("Incentive awards are discretionary and 'are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes to recognize their willingness to act as private attorney general.'" (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

Sixth Circuit (District Court)

Swigart v. Fifth Third Bank, 2014 WL 3447947, *7 (S.D. Ohio 2014) ("The modest class representative award requests of $10,000 to each of the two Class Representatives have been tailored to compensate each Class Representative in proportion to his or her time and effort in prosecuting the claims asserted in this action.").

Seventh Circuit

Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014) (reversing the settlement approval but noting that the

lower court "awarded [named plaintiffs] compensation (an 'incentive award,' as it is called) for their services to the class of either $5,000 or $10,000, depending on their role in the case. Saltzman, being the lead class representative, was slated to be a $10,000 recipient").

Eighth Circuit (District Court)

In re Zurn Pex Plumbing Products Liability Litigation, 2013 WL 716460, *2 (D. Minn. 2013) ("Service award payments are regularly made to compensate class representatives for their help to a class.").

Sauby v. City of Fargo, 2009 WL 2168942, *3 (D.N.D. 2009) ("Incentive awards serve to compensate class representatives for work done on behalf of the class.").

Ninth Circuit

In re Online DVD-Rental Antitrust Litigation, 779 F.3d 934, 943, 2015-1 Trade Cas. (CCH) ¶ 79083 (9th Cir. 2015) ("[I]ncentive awards that are intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.' " (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (stating that incentive awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general").

Tenth Circuit (District Court)

Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *4 (W.D. Okla. 2015) ("Case contribution awards are meant to 'compensate class representatives for their work on behalf of the class, which has benefited from their representation.' " (quoting In re Marsh ERISA Litigation, 265 F.R.D. 128, 150 (S.D.N.Y. 2010))).

Eleventh Circuit (District Court)

Burrows v. Purchasing Power, LLC, 2013 WL 10167232, *4 (S.D. Fla. 2013) ("[T]he Court finds that the Class Representative is not being treated differently than the Settlement Class members. Although the Class Representative seeks an incentive award, the incentive award is not to compensate the Class Representatives for damages but to reward him for his efforts on behalf of the Settlement Class.").

Morefield v. NoteWorld, LLC, 2012 WL 1355573, *4 (S.D. Ga. 2012) ("Service awards compensate class representatives for services provided and risks incurred during the class action litigation on behalf of other class members.").

District of Columbia Circuit (District Court)

Cobell v. Jewell, 29 F. Supp. 3d 18, 25 (D.D.C. 2014) ("[A]n incentive award is 'intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willing-

perform certain functions that arise in most cases, such as monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.[10] Class representatives sometimes

---

ness to act as a private attorney general.' " (quoting Rodriguez v. West Publishing Corp., 563 F.3d 948, 958–59, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009))).

[10]Lilly v. Jamba Juice Company, 2015 WL 2062858, *7 (N.D. Cal. 2015) (Granting incentive award because: "Named Plaintiffs have been substantially involved in the course of the litigation spanning two years. Plaintiff Lilly and Plaintiff Cox invested considerable time in the litigation and prepared for and gave deposition testimony. Plaintiff Cox took time off from work to participate in the litigation. Plaintiffs have also taken efforts to protect the interests of the class by discussing acceptable settlement terms with counsel.") (citations omitted).

Boyd v. Coventry Health Care Inc., 299 F.R.D. 451, 469, 58 Employee Benefits Cas. (BNA) 2084 (D. Md. 2014) ("In the final approval motion, Plaintiffs represent that this award is justified because each Named Plaintiff spent a considerable amount of time over the past four years contributing to the litigation and benefiting the class by reviewing the relevant documents; staying apprised of developments in the case and making themselves available to class counsel; providing class counsel extensive information and materials regarding their Plan investments; responding to Defendants' document requests; and reviewing and ultimately approving the terms of the settlement.").

Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665, 691 (D. Md. 2013) ("In the final approval motion, Plaintiffs represent that this award is justified because both Named Plaintiffs spent a considerable amount of time 'meeting and communicating with counsel, reviewing pleadings and correspondence, gathering documents' and participating in the mediation, all done in furtherance of the interests of the Settlement Classes.").

Heekin v. Anthem, Inc., 2012 WL 5878032, *1 (S.D. Ind. 2012), appeal dismissed, (7th Cir. 12-3786, 12-3871)(May 17, 2013) (approving award because class representatives "committed considerable time and effort over the seven years of litigation" and "[b]oth have conferred and participated with Class Counsel to make key litigation decisions, traveled to Indianapolis to attend hearings, and reviewed the Settlement to ensure it was a fair recovery for the Class") (citation omitted).

Been v. O.K. Industries, Inc., 2011 WL 4478766, *12 (E.D. Okla. 2011), report and recommendation adopted, 2011 WL 4475291 (E.D. Okla. 2011) ("The Court finds . . . that the five Class Representatives devoted substantial time and energy representing the interests of the Class . . . [Class Representative] testified that, for the nine years of litigation, each of the Class Representatives was actively involved in this case, including communicating with Class Counsel, communicating with Class Members, giving depositions, attending and representing the Class in settlement conferences, assisting with preparation for and attending trial, testifying

serve additional functions specific to the particular case.[11] In some cases, particularly securities cases litigated under the PSLRA which approach incentive awards in a distinct fashion,[12] courts have compensated class representatives directly for these services, for instance on an hourly basis,[13] but more

---

or being available to testify at trial, and continuously reviewing and commenting on copies of the filings made by the parties in this Court and in the Tenth Circuit.").

[11]In re Zurn Pex Plumbing Products Liability Litigation, 2013 WL 716460, *2 (D. Minn. 2013) ("The service payments sought under the settlement reflect the efforts by the class representatives to gather and communicate information to counsel and act as the public face of the litigation. The class representatives opened their homes up to inspection and testing, some of them more than once. Each assisted with the investigation and preparation of these suits, gathered documents for production, and helped class counsel.").

Burford v. Cargill, Inc., 2012 WL 5471985, *6 (W.D. La. 2012) ("Here, each plaintiff initially participated in telephone conferences with counsel, completed an intake questionnaire, discussed the questionnaire responses with counsel, and signed a contract of representation. As the litigation continued and as part of the discovery process, each plaintiff was required to fill out a detailed questionnaire regarding their use of Cargill feed and damages. To answer the two questions, plaintiffs were generally required to go through years of their business records. They were also required to produce hundreds of pages of records ranging from milk production records to tax returns. Therefore, the record supports enhancement awards in this case as all of the named Plaintiffs have provided valuable services to the class.") (citations omitted).

[12]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[13]Ontiveros v. Zamora, 303 F.R.D. 356, 366 (E.D. Cal. 2014) ("The court finds that a downward departure from the award proposed by parties from $73.80 per hour to $50 per hour fairly compensates the named plaintiff for his time and incorporates an extra incentive to participate in litigation. Multiplying that rate by the 271 hours the named plaintiff spent on litigation, the court finds he would be entitled to an award of $13,550.").

In re Stock Exchanges Options Trading Antitrust Litigation, 2006 WL 3498590, *13 (S.D.N.Y. 2006) ("The Court will award these named plaintiffs $100 per hour they sat in deposition; those that did not even sit for deposition will receive no incentive . . .").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) ("Pursuant to the Court's request, class representative Frank Seidman has furnished the Court with an adequate accounting that the time he spent working on matters related to this litigation is approximately thirty-two hours. Based on the time records and the representations made by counsel as to the activities undertaken by Frank

often courts simply acknowledge these functions as serving as the basis for the incentive award.

Risks. Courts often premise incentive awards on the risks that the class representatives undertook in stepping forward to represent the class.[14] These risks are at least two-fold: in some circumstances, the class representative could be liable for the costs of the suit,[15] while in other circumstances, a class representative might face retaliation.[16] Where the risks are specific and substantial, courts may increase the incen-

---

Seidman on behalf of the class, the Court shall award him a class representative fee totaling $1280 (32 hours at a rate of $40.00 per hour) from the D & T settlement fund as compensation for the actual time which he spent on this litigation.").

[14]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235-36 (10th Cir. 2009) ("[A] class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.").

Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 430, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007) ("The Court noted that incentive awards were related to the individual's personal risk and additional efforts to benefit the lawsuit.").

[15]Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 876–77, 19 Wage & Hour Cas. 2d (BNA) 798, 162 Lab. Cas. (CCH) P 36058 (7th Cir. 2012) ("And a class action plaintiff assumes a risk; should the suit fail, he may find himself liable for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees. The incentive reward is designed to compensate him for bearing these risks, as well as for as any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do. The plaintiff's duties are not onerous and the risk of incurring liability is small; a defendant is unlikely to seek a judgment against an individual of modest means (and how often are wealthy people the named plaintiffs in class action suits?). The incentive award therefore usually is modest—the median award is only $4,000 per class representative.") (citations omitted).

Fraley v. Facebook, Inc., 966 F. Supp. 2d 939, 947 n.13, 86 Fed. R. Serv. 3d 572 (N.D. Cal. 2013), appeal dismissed, (9th Circ. 13-17097)(Dec. 3, 2013) (finding incentive payments justified because, *inter alia*, "[t]he named plaintiffs here also at least theoretically were at risk of an attorney fee award being entered against them if Facebook prevailed, under the fee-shifting provisions of Civil Code § 3344").

[16]DeLeon v. Wells Fargo Bank, N.A., 2015 WL 2255394, *7 (S.D.N.Y. 2015) (approving $15,000 service award and noting that it, *inter alia*, "recognizes the risks that the named-Plaintiff faced by participating in a lawsuit against her former employer").

Parker v. Jekyll and Hyde Entertainment Holdings, L.L.C., 2010 WL 532960, *1 (S.D.N.Y. 2010) (approving $15,000 enhancement awards because, *inter alia*, "[A]s employees suing their current or former

tive award accordingly.[17]

Private attorneys general. Courts have often stated that class representatives perform a public function and may be rewarded accordingly. That function is to ensure enforcement of certain laws. As explained elsewhere in the Treatise,[18] one of the functions of the class action is to incentivize private parties to enforce certain laws such that the government is not required to undertake all law enforcement alone. Class action lawyers are often, therefore, labelled "private attorneys general."[19] But since class counsel need class representatives to pursue a class suit, courts have also dubbed the latter with the same moniker[20]—and acknowledged their public service through provision of an incentive

---

employer, the plaintiffs face the risk of retaliation. The current employees risk termination or some other adverse employment action, while former employees put in jeopardy their ability to depend on the employer for references in connection with future employment. The enhancement awards provide an incentive to seek enforcement of the law despite these dangers.").

Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D. N.Y. 2005) (recognizing that service awards are "particularly appropriate in the employment context" given the risk of retaliation by a current or former employer).

In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 276 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) (noting in prison inmate case that "incentive awards are also justified upon the grounds that the class representatives have . . . assumed the risk of retaliation and/or threats by acting as leaders in an unpopular lawsuit").

[17]Been v. O.K. Industries, Inc., 2011 WL 4478766, *12–13 (E.D. Okla. 2011), report and recommendation adopted, 2011 WL 4475291 (E.D. Okla. 2011) (describing specific forms of retaliation class representatives suffered and justifying $100,000 award in part on this basis).

[18]*See* Rubenstein, 1 **Newberg on Class Actions** § 1:8 (5th ed.).

[19]Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 566, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 109 Fair Empl. Prac. Cas. (BNA) 1, 93 Empl. Prac. Dec. (CCH) P 43877 (2010) ("The upshot is that the plaintiffs' attorneys did what the child advocate could not do: They initiated this lawsuit. They thereby assumed the role of 'a "private attorney general'" by filling an enforcement void in the State's own legal system, a function 'that Congress considered of the highest priority.'" (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263, 1 Empl. Prac. Dec. (CCH) P 9834 (1968) (per curiam))).

See generally, William B. Rubenstein, On What A "Private Attorney General" Is—And Why it Matters, 57 Vand. L. Rev. 2129 (2004).

[20]U.S. Parole Commission v. Geraghty, 445 U.S. 388, 100 S. Ct. 1202,

award.[21]

---

63 L. Ed. 2d 479, 29 Fed. R. Serv. 2d 20 (1980) ("[T]he Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement.").

Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1246, 9 Wage & Hour Cas. 2d (BNA) 1, 149 Lab. Cas. (CCH) P 34781, 57 Fed. R. Serv. 3d 69 (11th Cir. 2003) ("In essence, the named plaintiff who seeks to represent a class under Rule 23 acts in a role that is analogous to the private attorney general.") (internal quotation marks omitted).

Cf. Fox v. Vice, 131 S. Ct. 2205, 2213, 180 L. Ed. 2d 45, 94 Empl. Prac. Dec. (CCH) P 44197 (2011) (noting, in non-class suit that "[w]hen a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority' " (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263, 1 Empl. Prac. Dec. (CCH) P 9834 (1968) (per curiam))).

Cf. Fogerty v. Fantasy, Inc., 510 U.S. 517, 524, 114 S. Ct. 1023, 127 L. Ed. 2d 455, 29 U.S.P.Q.2d 1881 (1994) (noting, in non-class suit that "[o]ftentimes, in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources").

See generally, Daniel J. Meltzer, Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247 (1988).

[21]In re Linerboard Antitrust Litigation, 2004-1 Trade Cas. (CCH) ¶ 74458, 2004 WL 1221350, *18 (E.D. Pa. 2004), order amended, 2004 WL 1240775 (E.D. Pa. 2004) (noting that incentive payments were "particularly appropriate in this case because there was no preceding governmental action alleging a conspiracy").

In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) (stating that incentive "awards are granted to reward the public service performed by lead plaintiffs in contributing to the vitality and enforcement of securities laws").

In re Plastic Tableware Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71192, 1995 WL 723175, *2 (E.D. Pa. 1995) (noting that class representative incentive payments "may also be treated as a reward for public service").

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 121 (E.D. Pa. 1994) ("In securities class actions, incentive payments are also thought to encourage the enforcement of federal securities laws.").

In re SmithKline Beckman Corp. Securities Litigation, 751 F. Supp. 525, 535, Fed. Sec. L. Rep. (CCH) P 95,686 (E.D. Pa. 1990) ("[T]he Court agrees that special awards to the class representatives are appropriate. First, they have rendered a public service by contributing to the vitality of the federal Securities Acts. Private litigation aids effective enforcement of the securities laws because private plaintiffs prosecute violations that

Incentives. Courts have held that incentive awards are justified as a means for encouraging class members to step forward to represent the class. The Seventh Circuit stated in 1998 that: "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."[22] Courts in nearly every circuit have embraced the argument, often directly citing the Seventh Circuit's locution.[23] Typically, courts will simply identify this purpose

---

might otherwise go undetected due to the SEC's limited resources." (citation omitted) (internal quotation marks omitted).

[22]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

[23]**First Circuit (District Court)**

Baptista v. Mutual of Omaha Ins. Co., 859 F. Supp. 2d 236, 244 (D.R.I. 2012) ("An incentive award to a named plaintiff 'can be appropriate to encourage or induce an individual to participate' in a class action." (quoting In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448 (D.P.R. 2011))).

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 468 (D.P.R. 2011) ("'Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.'" (quoting In re Compact Disc Minimum Advertised Price Antitrust Litigation, 292 F. Supp. 2d 184, 189, 2004-1 Trade Cas. (CCH) ¶ 74293 (D. Me. 2003))).

Fourth Circuit (District Court)

Smith v. Toyota Motor Credit Corp., 2014 WL 4953751, *1 n.5 (D. Md. 2014) ("'Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.'" (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Boyd v. Coventry Health Care Inc., 299 F.R.D. 451, 468, 58 Employee Benefits Cas. (BNA) 2084 (D. Md. 2014) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Fifth Circuit (District Court)

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 869, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) ("Moreover, '[b]ecause a named plaintiff is an essential ingredient of any class action an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.'" (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Sixth Circuit

In re Dry Max Pampers Litigation, 724 F.3d 713, 723, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (Cole, J., dissenting) ("Where claims are

in approving an incentive award. Occasionally, however, a court will attend to the full meaning of the Seventh Circuit's

---

worth very little, as in this case, even a recovery in the full amount may not be enough to induce anyone to serve as a named plaintiff.").

Bickel v. Sheriff of Whitley County, 2015 WL 1402018, *7 (N.D. Ind. 2015) ("Incentive awards are justified when necessary to induce individuals to become named representatives." (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

Seventh Circuit

In re Synthroid Marketing Litigation, 264 F.3d 712, 722, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives.").

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) ("Incentive awards are appropriate if compensation would be necessary to induce an individual to become a named plaintiff in the suit.").

Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.").

Eighth Circuit (District Court)

Sauby v. City of Fargo, 2009 WL 2168942, *1 (D.N.D. 2009) ("Incentive awards are not intended to 'compensate' plaintiffs, but instead serve to encourage people with legitimate claims to pursue the action on behalf of others similarly situated.").

Ninth Circuit (District Court)

Barbosa v. MediCredit, Inc., 2015 WL 1966911, *9 (C.D. Cal. 2015) ("An incentive award is appropriate 'if it is necessary to induce an individual to participate in the suit.' " (quoting In re Cellphone Fee Termination Cases, 186 Cal. App. 4th 1380, 1394, 113 Cal. Rptr. 3d 510 (1st Dist. 2010), as modified, (July 27, 2010))).

In re Toys R Us-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation, 295 F.R.D. 438, 470, 87 Fed. R. Serv. 3d 968 (C.D. Cal. 2014) ("[I]t is well-established that the court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions.").

Tenth Circuit

UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (" 'Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives,' but there is no need for such an award 'if at least one [class member] would have stepped forward without the lure of an incentive award.' " (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722–23, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

statement—that an award is appropriate *if* it is necessary to induce an individual to serve as a class representative—and in so doing, the court will scrutinize whether the incentive award truly induced the class representative's service.[24]

Incentive awards surely make it look as if the class representatives are being treated differently than other class members, but the justifications for the awards help illuminate the fact that the class representatives are not similarly situated to other class members. They have typically done something the absent class members have not—

O'Brien v. Airport Concessions, Inc., 2015 WL 232191, *6 (D. Colo. 2015) ("The Court agrees that some award would be necessary to incentivize a plaintiff to come forward on behalf of the class in this case, and that the class has benefitted from his actions.").

Fankhouser v. XTO Energy, Inc., 2012 WL 4867715, *3 (W.D. Okla. 2012) ("Counsel also seek incentive awards for the named class representatives . . . Such awards 'are justified when necessary to induce individuals to become named representatives,' but there is no need for such an award 'if at least one [class member] would have stepped forward without the lure of an 'incentive award.' " (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 722–23, 2001-2 Trade Cas. (CCH) ¶ 73407, 51 Fed. R. Serv. 3d 736 (7th Cir. 2001))).

In re Motor Fuel Temperature Sales Practices Litigation, 271 F.R.D. 263, 293 (D. Kan. 2010) ("Courts have found that incentive awards to class representatives are justified if necessary to induce individuals to become named representatives, or to compensate them for personal risk incurred or additional effort and expertise provided for the benefit of the class.").

Droegemueller v. Petroleum Development Corp., 2009 WL 961539, *5 (D. Colo. 2009) ("Numerous courts have recognized that incentive awards are an efficient and productive way of encouraging members of a class to become class representatives, and in rewarding individual efforts taken on behalf of the class.").

[24]Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *2 (D. Minn. 2013) ("Plaintiffs quote, but fail to satisfy, the prerequisite expressed in those cases that 'an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' . . . Here, Plaintiffs have put forth no evidence or argument that persuades the Court that they required any enticement beyond their potential statutory recovery to bring this case, or that their actions in prosecuting it are deserving of a reward." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("[Plaintiff] has not provided evidence of these or any other factors the court should consider with respect to an incentive award. Moreover, in light of [plaintiff's] pursuit of several of these types of cases, the court finds that no additional incentive is necessary beyond the $100 in statutory damages already awarded.").

stepped forward and worked on behalf of the class—and thus to award them only the same recovery as the other class members risks disadvantaging the class representatives by treating these dissimilarly-situated individuals as if they were similarly-situated to other class members. In other words, incentive awards may be necessary to ensure that class representatives are treated equally to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.[25]

While the central cost of incentive awards is the risk that the class representative's interests will diverge from or conflict with those of the class, courts have addressed a host of other problems that arise in the implementation of incentive awards. These are discussed elsewhere in this unit of the Treatise.[26]

§ 17:4 Legal basis for incentive awards

It might be most apt to leave this section of the Treatise blank as Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards. The judiciary has created these awards out of whole cloth. In doing so, courts have explained the rationale for incentive awards, as discussed in the preceding section;[1] but few courts have paused to consider the legal authority for incentive awards. The Sixth Circuit's observation that "to the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design"[2] therefore accurately describes the judiciary's attention to the legal basis

---

[25]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *4 (S.D.N.Y. 2007).

See also Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A balance must be struck so that a class representative does not view his prospect for rewards as materially different from other members of the class, yet is not disadvantaged by his service in pursuing worthy claims.").

[26]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:4]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R.

for making incentive awards.

There are only a few scattered references in the reported case law to the legal basis for incentive awards, with no court addressing the question head on. The few references that exist suggest that courts generally treat incentive awards as somewhat analogous to attorney's fee awards. In common fund cases, the presence of a fund under the court's supervision serves as both the source of the award and, in a sense, as the source of authority for an award.[3] In fee-shifting cases, courts must look to the underlying statute for authority to tax a defendant for an incentive award.[4] Because no statutes do authorize such awards, incentive awards are rare in fee-shifting cases, absent a defendant's agreement to pay such awards.

On the common fund side, restitution supports a *fee* award: if the class representative alone is responsible for paying for class counsel's services, the other class members will be unjustly enriched by virtue of receiving the benefit of their services without paying for them; or, if class counsel is not compensated, they will not have realized the fair value of their services.[5] The argument for an incentive award proceeds by analogy: if the class representative provides a service to the class without the class paying for it, the class members will be unjustly enriched by virtue of receiving these services for free, and/or the class representatives are not realizing the full value of their services.[6] This analogy is not quite right, however. The basic rule of unjust enrich-

---

Serv. 3d 216 (6th Cir. 2013).

[3]For a discussion of common fund fee awards, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:53 to 15:107 (5th ed.).

[4]For a discussion of statutory fee-shifting, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:25 to 15:52 (5th ed.).

[5]For a discussion of the rationale for common fund fee awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:53 (5th ed.).

[6]In re Linerboard Antitrust Litigation, 2004-1 Trade Cas. (CCH) ¶ 74458, 2004 WL 1221350, *18 (E.D. Pa. 2004), order amended, 2004 WL 1240775 (E.D. Pa. 2004) ("Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly.").

In re Plastic Tableware Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71192, 1995 WL 723175, *2 (E.D. Pa. 1995) ("Payments to class representatives may be considered a form of restitutionary relief within the discretion of the trial court. They may also be treated as a reward for

ment is that a person's unsought provision of services generates no entitlement to payment; the common fund fee award is an exception to that rule but an exception typically justified by the fact that class counsel are providing professional (legal) services to the class.[7] Because the class representative is not providing professional services, her situation is best captured not by the exception for attorney's fees but by Judge Posner's summary of the basic rule of unjust enrichment: "If you dive into a lake and save a drowning person, you are entitled to no fee."[8]

A few courts have considered the possibility that incentive payments to the class representatives might be conceptualized as a "cost" or "expense" of the lawsuit that class counsel are entitled to pass on to the class.[9] The Seventh Circuit has speculated that: "Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce [the class representative] to participate in the suit

---

public service and for the conferring of a benefit on the entire class." (citation omitted)).

Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1313 (2006) ("From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others." (citing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992))).

[7]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (distinguishing right to fees from right to incentive awards in noting that "the law of restitution (excepting salvage in admiralty) generally confines the right to restitution to professionals, such as doctors and lawyers" (citing 2 George E. Palmer, The Law of Restitution, ch. 10 (1978))).

In re U.S. Bioscience Securities Litigation, 155 F.R.D. 116, 122 (E.D. Pa. 1994) ("We agree with Judge Posner that we cannot equate these investors with professionals 'such as doctors and lawyers.' The value of doctors' and lawyers' contributions are subject to readily available and objective benchmarks of reasonableness that the market supplies a court. No such objective referent exists for 10b-5 heroes. They are therefore not entitled to fees for lay service considerably less dangerous than diving into a lake to save a drowning victim." (discussing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992))).

[8]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992).

[9]For a discussion of recoverable costs in class action cases, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 16:1 to 16:11 (5th ed.).

could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable."[10] The Ninth Circuit suggested that any active class members' actual expenses might be compensated as costs and/or that services rendered to class counsel might be re-paid by class counsel.[11] But the Sixth Circuit, in a decision interpreting the word "expenses" in a settlement agreement, stated:

> Incentive awards, moreover, do not fit comfortably within the commonly accepted meaning of "expenses." Webster's Third New International Dictionary (1981) defines an expense as, alternatively, "something that is expended in order to secure a benefit or bring about a result;" "the financial burden involved typically in a course of action or manner of living;" "the charges that are incurred by an employee in connection with the performance of his duties and that typically include transportation, meals, and lodging while traveling;" "an item of outlay incurred in the operation of a business enterprise allocable to and chargeable against revenue for a specific period;" and "loss, injury, or detriment as the necessary price of something gained or as the inevitable result or penalty of an action." The idea common to these definitions is that of a pecuniary cost or necessary price.
>
> Under the facts of this case, at least, incentive awards bestowed on class representatives as a matter of grace after the

---

[10]Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992); *see also* Tiffany v. Hometown Buffet, Inc., 2005 WL 991982, *3 (N.D. Cal. 2005) (holding potential incentive payments not part of amount-in-controversy for jurisdictional purposes because jurisdictional inquiry looks only at "claims for special and general damages, attorneys' fees and punitive damages" and incentive payments "do not fall within any of these four categories" but "are more analogous to costs, which are excluded from the calculation of the amount in controversy" (citing Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (incentive payments to the class representative "could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable"))).

[11]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (stating, in the context of denying incentive payments to group of non-class representatives, that "class members can certainly be repaid from any cost allotment for their substantiated litigation expenses, and identifiable services rendered to the class directly under the supervision of class counsel can be reimbursed as well from the fees awarded to the attorneys").

> completion of the representatives' services do not constitute the "necessary price" of such services. Neither do the awards cover pecuniary costs. The district court justified the awards not on the basis of any monetary expenditures made by the named plaintiffs, but on the basis of these plaintiffs' non-pecuniary risks and their long-time leadership roles and communication functions. At oral argument, similarly, plaintiffs' counsel pointed to the valuable public service these men were said to have provided in lowering the risk of a recurrence of rioting at the Southern Ohio Correctional Facility. It does not seem to us that rewarding such a service with a cash payment can properly be equated with the reimbursement of "expenses" in any traditional sense of the word.[12]

Each of these three circuit decisions only touched upon the topic of incentive awards and none generated a legal basis supporting—or rejecting—incentive awards in common fund cases.

On the fee-shifting side, at least one court has held that there is no statutory basis for such an award (under Nevada fee-shifting law);[13] there are, however, scattered reports of defendants being ordered to pay incentive awards in fee-shifting cases.[14] More often, defendants may agree to pay such awards in settling fee-shifting cases and courts have

[12]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 528-29 (6th Cir. 2001).

[13]Sobel v. Hertz Corp., 53 F. Supp. 3d 1319, 1332 (D. Nev. 2014) (finding incentive awards appropriate but finding no authority to shift cost to defendant under applicable state statute, which provided for equitable relief and for the prevailing party to recover "reasonable attorney's fees and costs," since that provision "most assuredly does not encompass the requested incentive awards," but granting request "to be paid out of the common fund").

[14]Karraker v. Rent-A-Center, Inc., 492 F.3d 896, 899–900, 19 A.D. Cas. (BNA) 737 (7th Cir. 2007) (noting, in context of ascertaining prevailing party status for purposes of fee-shifting entitlement, that court approved $5,000 incentive award to named plaintiff and because "there is no settlement fund . . . the $5,000 is a direct payment from [defendant] to [plaintiff]").

Sauby v. City of Fargo, 2009 WL 2168942, *4 (D.N.D. 2009) ("It is neither improper for the class representatives to receive an award of a different amount as compared to other class members, nor does the Court find it would be improper to require the City to bear the burden of paying the incentive awards. The City's request for a pro rata reduction in each class member's refund improperly shifts the burden and unduly complicates the settlement. Consequently, the Court finds the City is to pay the incentive award from the $1.5 million common fund, with no correspond-

then approved the payments in providing general approval to the settlement itself;[15] consistently, when the settlement agreement does not so provide, courts have rejected requests for incentive awards on that basis.[16] Summarizing this situation, the Sixth Circuit stated in 2003:

> [I]ncentive awards are usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole . . . Without a common fund, however, there is no place from which to draw an incentive award. Unsurprisingly, we are unable to find any case where a claim for an incentive award that is not authorized in a settlement agreement has been granted in the absence of a common fund.
>
> Here there is neither authorization in the consent decree for this incentive award nor a common fund from which it could be drawn. As a result, it is plainly inappropriate to grant an incentive award . . . Forcing the defendants to pay the incentive award is certainly an additional expenditure, and it is

---

ing reduction of the refunds to be provided to participating class members." (citations omitted)).

[15]Equal Rights Center v. Washington Metropolitan Area Transit Authority, 573 F. Supp. 2d 205, 210 (D.D.C. 2008) (reporting that defendant agreed to pay incentive awards (of $5,000 to named plaintiffs and $1,000 to class members who were deposed but not named in the complaint) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

Bynum v. District of Columbia, 412 F. Supp. 2d 73, 80–81 (D.D.C. 2006) (reporting that defendant agreed to pay incentive awards (totaling $200,000) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

FitFitzgerald v. City of Los Angeles, 2003 WL 25471424, *1–2 (C.D. Cal. 2003) (reporting that defendant agreed to pay incentive awards ($3,500 to named plaintiff and $3,500 to declarant for the damages class) as part of settlement agreement in fee-shifting case brought under 42 U.S.C. § 1983).

[16]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 522, 529 n.4 (6th Cir. 2001) (reversing award of incentive payments by defendant in non-common fund case because settlement agreement did not provide for them).

Estep v. Blackwell, 2006 WL 3469569, *7 (S.D. Ohio 2006) (denying incentive award because, in absence of common fund, payment would have to come from defendant and settlement agreement did not provide for defendant to make such a payment).

therefore impermissible.[17]

Given that incentive awards are relatively common in class action practice, their legal basis is surprisingly thin. However, as most class suits settle, the parties typically agree to pay the class representatives some incentive award. The only adversarial challenge to this would come from objectors. Absent class members are generally unlikely to object to such awards because even if they were successful, the money would simply remain in the common fund to be distributed to the class and the single member's share of it would be negligible.[18] These dynamics have created few occasions in which courts have been required to consider seriously the legal basis for paying the class representatives from the class's recovery.

§ 17:5 Source of incentive awards

As discussed in the preceding section of the Treatise,[1] the legal basis for incentive awards may vary depending on the fee structure of a class action. In common fund cases, fees are paid out of the common fund; in fee-shifting cases, fees are paid by the defendant. So too incentive awards, though occasionally courts have implied that incentive awards may be paid out of the attorney's fees or re-paid as recoverable costs.

Common fund. Courts have generally approved incentive awards that are withdrawn from the common fund at the conclusion of the common fund case. Taking incentive awards from the common fund means that the class members are paying the incentive awards.[2] This is consistent with one legal theory loosely underlying such awards, discussed in

---

[17]Hadix v. Johnson, 322 F.3d 895, 897–99, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003).

[18]*Cf.* Matter of Continental Illinois Securities Litigation, 962 F.2d 566, 573–74 (7th Cir. 1992), as amended on denial of reh'g, (May 22, 1992) (discussing the awarding of attorney's fees and noting that "[n]o class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule. So the lawyers had no opponent in the district court and they have none here.").

[Section 17:5]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157,

the prior section:[3] that class members would be unjustly enriched if they were able to secure the services of the class representatives at no cost.

Defendant. If a case does not create a common fund, the defendant may be required by a fee-shifting statute to pay a prevailing party's legal fees;[4] if such a case settles, the defendant will typically agree to pay class counsel's legal fees as part of the settlement. In such settlements, a defendant will often agree to pay the class representatives an incentive award, subject to court approval. In the absence of such an agreement, counsel would have to petition the court to order the defendant to pay the incentive awards. As discussed in the prior section of the Treatise,[5] there is no statutory basis for such an award and courts have rejected awards on that basis, although there are a few scattered reports of defendants being ordered to pay incentive awards in fee-shifting cases.

Attorney's fees. In some rare cases, courts have alluded to the idea that incentive awards may be are paid by class counsel out of their fees and expenses.[6] However, if counsel give a portion of their fees to their clients, the payment

---

1163 (9th Cir. 2013) ("In cases where the class receives a monetary settlement, the [incentive] awards are often taken from the class's recovery.").

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 2015-1 Trade Cas. (CCH) ¶ 79151, 2015 WL 1498888, *18 (E.D. Mich. 2015) ("Payment of incentive awards to class representatives is a reasonable use of settlement funds." (citing Moulton v. U.S. Steel Corp., 581 F.3d 344, 351, 74 Fed. R. Serv. 3d 918 (6th Cir. 2009))).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[4]For a discussion of fee-shifting statutes, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 15:25 to 15:52 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[6]In re Southern Ohio Correctional Facility, 24 Fed. Appx. 520, 532 n.4(6th Cir. 2001) (reversing a district court's approval of an incentive award and noting that court's "conclusion is in no way affected by the district court's stipulation that the incentive awards were to be deducted from the approximately $1.659 million already set aside for attorney fees and expenses").

In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) ("Lead Counsel seeks permission to make an incentive payment . . . out of the proposed attorneys' fees . . . An incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.").

would likely violate the ethical prohibition on a lawyer sharing a fee with a non-lawyer,[7] as well as the prohibition on a lawyer going into business with her client.[8] It would also create bad policy.[9]

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) ("Plaintiffs' counsels' request for permission to make incentive payments of $2,000 each to five of the individual class representatives is approved as set forth in the order. The matter of payments of incentives to the individual plaintiffs who acted as class representatives need not be subjected to intense scrutiny inasmuch as these funds will come out of the attorney's fees awarded to plaintiffs' counsel. The interests of the class, of the public, and of the defendant are not directly affected.").

Cf. In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *7 (E.D. Tenn. 2010) (noting, in shareholder derivative suit, that requested incentive awards "would be paid out of the attorney's fees and expenses awarded to Plaintiffs' counsel," but discussing problems with that approach and then holding that "these considerations suggest that it is generally best for incentive awards to be paid out of a common fund or by defendants, rather than by plaintiffs' counsel").

[7]Model Rules of Professional Conduct (ABA), Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a nonlawyer . . .").

Campbell v. Fireside Thrift Co., 2004 WL 49708, *11 (Cal. App. 1st Dist. 2004), unpublished/noncitable (holding that "funding the incentive award by offsetting it against Class Counsel's fees would constitute sharing fees with a non-lawyer, which is prohibited by rule 1-320 of the State Bar Rules of Professional Conduct").

But see In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *8 (E.D. Tenn. 2010) (finding incentive award paid from attorney's fees inappropriate despite concluding that "there is no ethical concern" with such an arrangement because the "Tennessee Rules of Professional Conduct prohibit lawyers from sharing fees with nonlawyers except, *inter alia*, 'a lawyer may share a court-awarded fee with a client represented in the matter for which the fee was awarded' " (quoting Tenn. Sup. Ct. R. 8, RPC 5.4(a)(4))).

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) (noting that when incentive awards were to be paid out of counsel's fees, the "sole reason for seeking judicial approval appears to be Code of Professional Responsibility DR 3-102 which bars splitting of legal fees with non-lawyers with exceptions not pertinent here" but approving award).

[8]Model Rules of Professional Conduct (ABA), Rule 1.8(a) ("A lawyer shall not enter into a business transaction with a client . . .").

[9]In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *8 (E.D. Tenn. 2010) ("The scarcity of incentive awards paid from counsel's fees may be indicative of their problematic nature. Because the incentive award will come directly from attorney's fees, Plaintiffs' counsel is asking for the opportunity to pay the named plaintiffs. This puts Plaintiffs'

Expense. To the extent that the incentive award is conceptualized as a litigation cost or expense, as a few courts have suggested,[10] then it could be recovered from the fund or the defendant according to any applicable costs provision.[11] That said, few courts regard such payments as recoverable costs.

§ 17:6 Eligibility for incentive awards

At the conclusion of a class action, the class representatives are eligible for incentive awards in recognition of their service to the class. The rationales for incentive awards, discussed in a preceding section,[1] are that the recipient should be compensated for the work she undertook for the class, for the risks she took in doing so, and for stepping forward to serve as a sort of "private attorney general." The tests courts apply in determining whether or not to approve a proposed incentive award, described in the succeeding section,[2] similarly focus on the services that the applicant

---

counsel in an unusual position, seeking to convince a court they should pay money. While the amount of money here ($10,000 total) is small relative to the total attorney's fees, it is still an expenditure, and therefore their own financial interest conflicts with the named plaintiffs. Plaintiffs' counsel has the most information about what involvement the named plaintiffs had; yet their description of the named plaintiffs' activities is skimpy. Furthermore, Defendants have no motivation to challenge Plaintiffs' counsel's assertions. In addition, paying plaintiffs could lead to professional plaintiffs. These considerations suggest that it is generally best for incentive awards to be paid out of a common fund or by defendants, rather than by plaintiffs' counsel.").

Campbell v. Fireside Thrift Co., 2004 WL 49708, *12 (Cal. App. 1st Dist. 2004), unpublished/noncitable ("[I]t also appears to us to present at least a potential conflict of interest for class counsel to negotiate the payment of an incentive award out of their own fees, because of the resulting divergence between their own interests, those of the class representative, and those of the class as a whole.").

[10]The expense rationale for an award is discussed in the preceding section of the Treatise. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[11]For a discussion of the recovery of nontaxable costs in class actions, *see* Rubenstein, 5 **Newberg on Class Actions** §§ 16:5 to 16:10 (5th ed.).

[Section 17:6]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

provided to the class.[3] Occasionally, these tests are framed in terms of whether the "class representative" provided these services to the class,[4] but the rationale—that a class member should be rewarded for her service to the class—can apply to a wider group of class members.

Thus, lawyers have sought incentive awards for at least four types of class members:

- *Class representatives* are those plaintiffs whom class counsel proposes, and a court appoints, to represent the class. These class representatives serve as the formal "client" on behalf of the class. As such, they are the class members most likely to undertake the tasks that justify an incentive award and hence are the primary beneficiaries of such awards.
- *Named plaintiffs* are those plaintiffs identified individually in the complaint, on whose behalf the case is initially lodged as a putative class action. Class counsel need not put forward all named plaintiffs, or only named plaintiffs, as proposed class representatives. And even if class counsel does propose that all of the named plaintiffs serve as class representatives, a court might approve some but not others. In many cases, however, the class representatives proposed by class counsel and approved by the court will be precisely (and only) those plaintiffs named in the complaint, meaning the two concepts will overlap completely. For that reason, courts often utilize the terms interchangeably, though in some circumstances, the two are not synonymous. Specifically, in some cases, a named plaintiff will not serve as a formal class representative, but by virtue of having

[3] *See, e.g.,* Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) (directing courts to consider "[1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation").

[4] *See, e.g.,* Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (stating that in reviewing a proposed incentive award, a court should consider: "1) the risk to *the class representative* in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the *class representative*; 3) the amount of time and effort spent by the *class representative*; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the *class representative* as a result of the litigation") (emphasis added).

been named in the complaint, she may have undertaken some of the tasks that would make her eligible for an incentive award.[5]

- *Other class members* who are neither class representatives nor named plaintiffs might be eligible for incentive awards if they meaningfully participated in the litigation and conferred a benefit on the class. Typically, such awards may be paid to class members who, for example, were deposed by the defendant.[6] While any

[5]In re TFT-LCD (Flat Panel) Antitrust Litigation, 2013-1 Trade Cas. (CCH) ¶ 78318, 2013 WL 1365900, *17 (N.D. Cal. 2013), appeal dismissed, (9th Circ. 13-15929) (July 12, 2013) and appeal dismissed, (9th Circ. 13-15915) (June 12, 2014) and appeal dismissed, (9th Circ. 13-15916, 13-15930) (June 13, 2014) and appeal dismissed, (9th Circ. 13-15917) (June 13, 2014) ("The Court approves incentive awards of $15,000 to each of the 40 court-appointed class representatives, and $7,500 for each of eight additional named plaintiffs. The Court recognizes the contribution these class representatives and named plaintiffs made to this litigation and finds the amounts requested are reasonable in light of these contributions.").

Cf. Shames v. Hertz Corp., 2012-2 Trade Cas. (CCH) ¶ 78120, 2012 WL 5392159, *22 (S.D. Cal. 2012), appeal dismissed, (9th Circ. 12-57247) (Jan. 23, 2013) and appeal dismissed, (9th Circ. 12-57211, 12-57026) (July 16, 2013) and appeal dismissed, (9th Cir 12-27205) (Sept. 20, 2013) (approving incentive award for class representative but noting that second individual, "though a named plaintiff, has not been put forth as a class representative and does not seek an incentive award").

But see Mancini v. Ticketmaster, 2013 WL 3995269, *2 (C.D. Cal. 2013), appeal dismissed, (9th Cir. 13-56536) (Oct. 4, 2013) (denying incentive award to named plaintiffs who were not approved class representatives and finding the named plaintiffs' argument that they, like the class representatives, also "incurred risks of liability for defendants' costs, had little to personally gain from the litigation, and remained involved for many years, including producing documents, appearing for deposition and submitting declarations," unpersuasive).

[6]Shaw v. Interthinx, Inc., 2015 WL 1867861, *4 (D. Colo. 2015) (granting incentive awards where the "[n]amed Plaintiffs and Class Counsel request approval of $10,000 incentive awards to each of the five Named Plaintiffs and $2,500 incentive awards to each of the two Deposed Opt-in Plaintiffs—representing *in toto* less than 1% of the maximum value of the common fund, or .1667% for each Named Plaintiff and .04167% for each Deposed Opt-in Plaintiff").

Camp v. Progressive Corp., 2004 WL 2149079, *7 (E.D. La. 2004) (awarding $2,500 to non-representative class members who gave a deposition, and $1,000 to non-representative class members who were not deposed but who assisted in the preparation of discovery responses, in class action to recover unpaid wages under the FLSA).

class member may therefore be eligible for an incentive award based on her work on behalf of the class, courts are hesitant to provide awards to large groups of plaintiffs, even if active in the litigation, beyond the core group identified as class representatives (or named plaintiffs).[7]

- *Objectors.* Counsel who object to a class settlement might also seek an incentive award for the class member on whose behalf they lodged the objection. Specifically, any class member who does not opt out of the class may object to a proposed settlement or attorney fee award at the conclusion of the class suit.[8] In doing so, an objector may provide a service to the class and therefore be eligible for an incentive award. Objector incentive awards are considered in a separate section at the end of this unit of the Treatise.[9]

§ 17:7 Frequency of incentive awards

There are several studies that provide some limited empirical evidence concerning the frequency and size of incentive awards. One study, conducted by the Federal Judicial Center ("FJC"), examined class action terminations in four districts in the early 1990s, with some passing references to incentive awards.[1] The most comprehensive published study of incentive awards looked at 374 opinions in

---

[7] *See, e.g.,* Staton v. Boeing Co., 327 F.3d 938, 976, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (denying higher awards to "[t]he two hundred-odd IIRs who were not class representatives" partly because they "were not essential to the litigation, although they may have been helpful to it").

[8] The objection process is discussed in detail elsewhere in the Treatise. *See* Rubenstein, 4 **Newberg on Class Actions** §§ 13:20 to 13:37 (5th ed.).

[9] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:20 (5th ed.).

[Section 17:7]

[1] Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule (1996). A report on that study is published elsewhere. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

class action settlements published from 1993-2002.[2] The Treatise author's own database contains information on incentive awards in nearly 1,200 class actions resolved between 2006–2011.[3] These studies provide data on the frequency with which courts approve incentive awards.

The FJC study from the early 1990s reported that a "substantial minority of all certified, settled class actions in which the court approved a settlement included designated awards to the named class representatives."[4] Specifically, courts granted incentive awards in the four federal districts in 26% (E.D. Pa.), 46% (S.D. Fla.), 40% (N.D. Ill.), and 37% (N.D. Cal.) of all cases, for a total of awards in 44 of 126 cases, or 34.9%.[5] The comprehensive 10 year study found that 27.8% (104) of all 374 cases involved incentive awards.[6] The 1993–2002 study further broke down incentive award frequency by case type. The data show that incentive awards were most frequently granted in consumer credit (59.1%) and commercial cases (57.1%) and least frequently granted in mass tort (7.1%) and corporate cases (4.2%), while no awards were granted in six tax refund cases.[7]

The Treatise author's own data base suggests a remarkable shift in the frequency of class actions culminating in incentive awards, as presented in Table 1, below.

---

[2]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006).

[3]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[4]Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

[5]Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* 120 fig.16 (1996).

[6]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1320 (2006).

[7]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

Table 1
Empirical Data on Frequency of Incentive Awards

Awards Granted	1993–2002 Study[8]	2006–2011 Study[9]
Antitrust	35%	79.4%
Civil Rights	10.5%	94.6%
Consumer	33.3%	93.4%
Employment- Discrimination	46.2%	75.0%
Employment—Wages/Benefits	23.1%	87.8%
Securities	24.5%	38.7%
TOTAL (all case types including types not included above)	27.8%	71.3%

The more recent data suggest four interesting trends. *First*, while the 1993–2002 study found courts providing incentive awards in 27.8% of all cases, the 2006–2011 data show courts providing incentive awards in 71.3% of all cases. The frequency with which incentive awards are awarded therefore appears to have increased by 156% in recent years, with awards being provided in almost three quarters of all cases. *Second,* the increase occurs across case types, as set forth in Table 1, below. *Third,* securities cases remain those with the lowest percentage of award grants, which is consistent with the statutory framework of the PSLRA.[10] Nonetheless, it appears that some form of remuneration is paid to class representatives in about a third of securities cases. *Fourth*, while incentive awards have proliferated, they appear to have simultaneously become more modest; the size of incentive awards is discussed in the succeeding section of the

[8]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

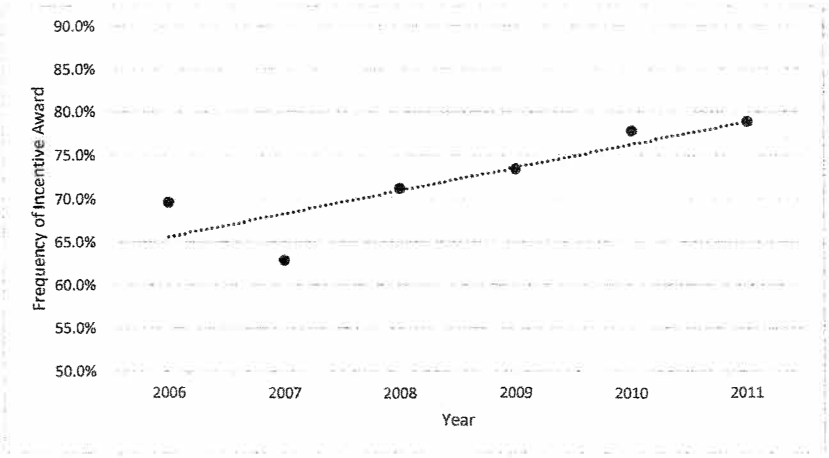
[9]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[10]For a discussion of incentive awards under the PSLRA, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

Treatise.[11]

The increased prevalence of incentive awards in our study was is so stunning, that we broke the data down among each of the six years of the study (2006–2011). Doing so demonstrated that the frequency of incentive awards increased across those years (but for a blip in the second year). Therefore, our conclusion that courts approved incentive awards in 71.3% of all cases between 2006–2011 masks the facts that courts approved awards in 69.6% and 62.8% of cases in the first two years (2006–2007) but in nearly 80% of all cases (78.6%) by 2011. These data are shown in Graph 1, below.

Graph 1
Empirical Data on Frequency of Incentive Awards—2006–2011[12]



[11] *See* Rubenstein, 5 **Newberg on Class Actions** § 17:8 (5th ed.).

[12] William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

The increased frequency with which courts have provided incentive awards may be attributable to a combination of several factors. The earlier study went back to 1993, which was about when incentive awards began,[13] so it is not surprising that the practice would have been sparser in those years. As the practice increased, it is quite likely that class counsel sought incentive awards more often, not that courts *sua sponte* offered them more often. However, the dramatic change over time also suggests that courts showed little resistance to the increasing requests for such awards. Neither study provides data on the frequency with which requested awards are approved, rejected, or reduced; but the case law contains far more cases routinely approving awards than outright rejecting them.[14]

These newer data provide strong support for the conclusion that incentive awards are a quite common part of class action practice today.

§ 17:8 Size of incentive awards

There are several studies that provide some limited empirical evidence concerning the frequency and size of incentive awards. One study, conducted by the Federal Judicial Center ("FJC"), examined class action terminations in four districts in the early 1990s, with some passing references to incentive awards.[1] The most comprehensive published study of incentive awards themselves looked at 374

---

[13]On the history of incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:2 (5th ed.).

[14]*See, e.g.,* In re Dry Max Pampers Litigation, 724 F.3d 713, 717, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("The district court entered its 'Final Approval Order and Final Judgment' later that afternoon [of the fairness hearing]. With the exception of a few typographical changes, the order was a verbatim copy of a proposed order [including incentive award provisions] that the parties had submitted to the court before the hearing. The order was conclusory, for the most part merely reciting the requirements of Rule 23 in stating that they were met. About Greenberg's objections, the order had nothing to say.").

[Section 17:8]

[1]Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* (1996). A report on that study is published elsewhere. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the

opinions in class action settlements published from 1993–2002.[2] The author's own database contains information on incentive awards in approximately 1,200 class actions resolved between 2006–2011.[3] The studies provide data on the size of incentive awards.

The size of incentive awards can be viewed at the case level (total amount of incentive awards approved in the case) or at the individual level (amount per class representative), with data available on both average and median sizes. The FJC study from the early 1990s reported that the "median amounts of all awards to class representatives in the four districts were $7500 in E.D. Pa. and N.D. Ill., $12,000 in S.D. Fla., and $17,000 in N.D. Cal. . . . The median award per representative in three courts was under $3000 and in N.D. Cal. was $7560."[4] The data from the two more recent studies appear in Table 1 below.

Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996).

[2]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303 (2006).

[3]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[4]Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 101 (1996). The larger version of this study shows these numbers to be $2,500 (E.D. Pa.), $2,583 (S.D. Fla.), $2,964 (N.D. Ill.). Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rule* 121 (1996) (fig. 18).

Table 1
Empirical Data on Size of Incentive Awards

	1993–2002 Study[5] In 2002 $	2006–2011 Study[6] In 2002 $	2006–2011 Study[7] In 2011 $
Median Total Incentive Award	$18,191	$8,398	$10,500
Median per Plaintiff	$4,357	$4,199	$5,250
Mean Total Incentive Award	$128,803	$26,326	$32,915
Mean per Plaintiff	$15,992	$9,355	$11,697

The two studies show that the average award per plaintiff ranged from $9,355 (in 2002 dollars) in one study to $15,992 (in 2002 dollars) in the other, while the median award per plaintiff in both studies, adjusted to 2002 dollars, fell right between $4,000–$4,500. Both studies therefore show much higher means than medians, suggesting there are some cases in the study with extremely high rewards (driving the average much higher than the median).

This conclusion is supported by data from the 1993–2002 study that breaks down incentive award size by case type. The data show that the mean incentive award per representative was largest in employment discrimination cases ($69,850.20) and smallest in consumer credit cases ($1,326.30).[8] The employment discrimination numbers are far higher than the mean or median numbers, likely because the named plaintiffs in these cases are being rewarded for the risks of retaliation that they faced, as well as for their more routine services provided to the class.

It is difficult to draw any conclusions about trends—the

[5]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. Rev. 1303, 1346, 1348 (2006).

[6]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[7]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

[8]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. Rev. 1303, 1333 tbl.5 (2006).

later study (from 2006–2011) had a slightly lower median award per plaintiff than the earlier data (1993–2002), and the later data also showed a 42% decrease in the mean award per plaintiff when all the data is adjusted to 2002 dollars (from $15,992 to $9,355). It is plausible that this decrease reflects a growing judicial unease with the practice of incentive awards and greater attention to their size. However, as discussed in the preceding section of the Treatise,[9] awards are far more common today than they were 15 years ago, suggesting that perhaps the proliferation of awards has simultaneously tempered their magnitude.

While the size of incentive awards vary from case to case, they may also vary within one case. As discussed in a succeeding section,[10] courts employ multifactor tests in reviewing proposed incentive awards; these factors focus the court on issues related to the class representatives' work on the case and the risks they encountered undertaking that work. Two class representatives within the same case might have undertaken different levels of work or encountered different levels of risk, hence justifying different levels of incentive awards.[11]

§ 17:9 Judicial review—Generally

As Rule 23 does not explicitly authorize incentive awards for class representatives, there is neither a rule-based process for seeking judicial approval nor a rule-based standard governing the court's decision. Yet, as the awards are made in conjunction with a class action settlement—typically from the class's funds[1] and to the class's representatives[2]—there is no doubt that a court must approve of the disbursement.

---

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:7 (5th ed.).

[10]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[11]Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A differential payment may be appropriate in order to make the class representative whole. The representative plaintiff may have lost wages, vacation time or commissions from sales because of time spent at depositions or other proceedings. A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded.") (citations omitted).

[Section 17:9]

[1]For a discussion of the source of incentive awards, *see* Rubenstein, 5

Five sets of issues arise in the judicial review process:

- When is a motion seeking approval of incentive awards brought forward?[3]
- What is the burden of proof the movant must meet to justify an incentive award?[4]
- What documentation is required?[5]
- What standards do courts apply in assessing the reasonableness of a proposed award?[6]
- What practices are disfavored?[7]

§ 17:10 Judicial review—Timing of motion

Incentive awards arise at the time of a proposed settlement of a class action. The parties typically include a provision for incentive awards in the negotiated settlement agreement. A court thus reviews the proposed award in conjunction with its preliminary review of the proposed settlement.[1] If preliminary approval is granted, notice of the proposed settlement is sent to the class and should include information about any proposed incentive award. The notice should specify the amount that class counsel intend to seek for the class representatives so that the class has that information when reviewing the settlement.[2] Class members have the opportunity to object to the proposed settlement, including the proposed incentive awards, both in writing and at the fairness hearing.[3] Class counsel will then move for final approval of the settlement and their fees, typically folding

---

Newberg on Class Actions § 17:5 (5th ed.).

[2]For a discussion of who is eligible to receive an incentive award, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:10 (5th ed.).

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:11 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:10]

[1]For a discussion of the preliminary approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:10 to 13:19 (5th ed.).

[2]For a discussion of the content of settlement and fee notice, *see* Rubenstein, 3 **Newberg on Class Actions** §§ 8:13 to 8:25 (5th ed.).

[3]For a discussion of the objection process, *see* Rubenstein, 4 **Newberg**

into those motions a request for final approval of the incentive award.[4] Following the fairness hearing, the court's decision granting or rejecting final approval of the settlement and fees typically also reviews the propriety of the proposed awards.

One interesting aspect of this process not discussed in the case law concerns when the class representatives should learn that class counsel and the defendant have negotiated a provision proposing incentive awards and the amount of the proposed awards. The class representative serves a particular function at the moment of a settlement proposal: she is asked to stand in for the absent class members and serve as a representative "client" assessing whether the relief obtained for the class is sufficient. Courts have accordingly expressed concern that the promise of a significant incentive award could persuade the class representative to agree to a settlement not otherwise beneficial to the class.[5] Even though the class representative's claim, like everyone else's, would be compromised at the level of the weak settlement, the size of the incentive award likely so dwarfs the marginal loss from the poor settlement to her personally that she has more reason to embrace the settlement than to resist it. A conflict of interest therefore exists.

Courts have expressed these concerns in policing the *availability* and *size* of incentive awards,[6] but they have not focused on the possibility of addressing the concerns through *process* requirements. When it comes to attorney's fees, it is generally accepted that class counsel and the defendant should not negotiate fees until the settlement terms themselves are in place. The goal of this approach is to ensure

---

on Class Actions §§ 13:20 to 13:37 (5th ed.).

[4]For a discussion of the final approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:39 to 13:61 (5th ed.).

[5]Lane v. Page, 862 F. Supp. 2d 1182, 1238, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) ("Courts 'have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit.' " (quoting **Newberg on Class Actions**)).

The Treatise's coverage of the rationale supporting incentive awards examines these concerns in more detail. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[6]For a discussion of excessive incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

that a huge fee offer will not tempt class counsel to settle the class claims on the cheap. With fee discussions forestalled until a later time, they pose less of a threat to the purity of the settlement process. By analogy, the courts could insist that incentive awards not be discussed with (or dangled over) the class representatives until after class counsel has solicited their reactions to the proposed class settlement.[7]

§ 17:11 Judicial review—Burden of proof

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. At least three circuits have held that judicial review of incentive awards is searching:

- The Sixth Circuit has held that "applications for incentive awards are *scrutinized carefully* by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain."[1] A number of courts have employed this "scrutinized carefully" language when reviewing proposed incentive awards.[2]
- The Ninth Circuit has held that "district courts must be

---

[7]*See, e.g.*, Lee v. Enterprise Leasing Co.-West, 2015 WL 2345540, *11 (D. Nev. 2015) ("The Court finds that the requested incentive awards are reasonable and appropriate. Importantly, the incentive awards were negotiated after the parties agreed to a settlement to benefit the entire class, so they will not impact the recovery available to other class members.").

[Section 17:11]

[1]Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) (emphasis added) (citing **Newberg on Class Actions**).

[2]Arnett v. Bank of America, N.A., 2014 WL 4672458, *11 (D. Or. 2014) ("Although incentive awards are fairly typical in class action cases, they should be scrutinized carefully to ensure that they do not undermine the adequacy of the class representatives." (citation omitted) (internal quotation marks omitted))).

Gascho v. Global Fitness Holdings, LLC, 2014 WL 1350509, *26 (S.D. Ohio 2014), report and recommendation adopted, 2014 WL 3543819 (S.D. Ohio 2014) (" '[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead

Case: 24-1757 Document: 32-3 Page: 234 Filed: 12/06/2024 (234 of 1275)
Case 1:16-cv-07775-PKC Document 321-3 Filed 10/11/23 Page 234 of 1441

vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives."[3] District courts in the Ninth Circuit have often reiterated this standard in reviewing incentive awards.[4]

---

named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.' ") (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003)).

Dickerson v. Cable Communications, Inc., 2013 WL 6178460, *4 (D. Or. 2013) ("Although incentive awards are fairly typical in class action cases, they should be scrutinized carefully to ensure that they do not undermine the adequacy of the class representatives." (citation omitted) (internal quotation marks omitted)).

Lane v. Page, 862 F. Supp. 2d 1182, 1237, Fed. Sec. L. Rep. (CCH) P 96834 (D.N.M. 2012) (" '[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to compromise the interest of the class for personal gain.' " (quoting Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003))).

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *6 (D.N.M. 2011) (same).

Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("Payments to class representatives, while not foreclosed, should be closely scrutinized.").

Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 257 (D.N.J. 2005) (holding that because incentive awards would be paid from the common fund and thereby deplete class members' recoveries, "this Court carefully reviews this request to ensure its fairness to the Class").

[3]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013) (emphasis added).

[4]Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) ("The Ninth Circuit requires district courts to be 'vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013))).

Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) ("The Ninth Circuit has emphasized that 'district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013))).

Miller v. Ghirardelli Chocolate Company, 2015 WL 758094, *7 (N.D. Cal. 2015) (same).

Boring v. Bed Bath & Beyond of California Limited Liability Company, 2014 WL 2967474, *3 (N.D. Cal. 2014) ("[D]istrict courts must

Appx4602

- The Eleventh Circuit, in a case unrelated to incentive awards, stated that "[w]hen a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a *substantial burden* falls upon the proponents of the settlement to demonstrate and document its fairness"[5] and that "*careful scrutiny* by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of absent class members."[6]

---

be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013)).

Custom LED, LLC v. eBay, Inc, 2014 WL 2916871, *9 (N.D. Cal. 2014) (same).

Cordy v. USS-POSCO Industries, 2014 WL 1724311, *2 (N.D. Cal. 2014) (same).

Wallace v. Countrywide Home Loans, Inc., 22 Wage & Hour Cas. 2d (BNA) 849, 2014 WL 5819870, *4 (C.D. Cal. 2014) (same).

Khanna v. Intercon Sec. Systems, Inc., 2014 WL 1379861, *10 (E.D. Cal. 2014), order corrected, 2015 WL 925707 (E.D. Cal. 2015) (same).

Steinfeld v. Discover Financial Services, 2014 WL 1309692, *2 (N.D. Cal. 2014) (same).

Ritchie v. Van Ru Credit Corp., 2014 WL 956131, *4 (D. Ariz. 2014), subsequent determination, 2014 WL 3955268 (D. Ariz. 2014) (same).

Keirsey v. eBay, Inc, 2014 WL 644738, *1 (N.D. Cal. 2014) (same).

Walsh v. Kindred Healthcare, 2013 WL 6623224, *3 (N.D. Cal. 2013) (same).

Davis v. Cole Haan, Inc., 2013 WL 5718452, *3 (N.D. Cal. 2013) (same).

Wolph v. Acer America Corporation, 2013 WL 5718440, *6 (N.D. Cal. 2013) (same).

Johnson v. General Mills, Inc., 2013 WL 3213832, *7 (C.D. Cal. 2013) ("The Ninth Circuit has recently cautioned that 'district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.' " (quoting Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013)).

[5]Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983) (emphasis added).

Cohen v. Resolution Trust Corp., 61 F.3d 725, 728 (9th Cir. 1995), opinion vacated, appeal dismissed, 72 F.3d 686 (9th Cir. 1996) (same).

[6]Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983) (emphasis added) (internal quotation marks

Courts have also cited this standard when reviewing proposed incentive awards.[7]

This heightened judicial scrutiny toward incentive awards[8] is appropriately consistent with the manner in which courts review class counsel's fee petition, as the court acts in a fiduciary capacity for absent class members during the settlement and fee review process.[9]

A few courts have implied that less scrutiny is required if the proposed incentive award is being paid out of the attorney's fees rather than the common fund.[10] However, as

---

omitted).

[7]Johnson v. General Mills, Inc., 2013 WL 3213832, *7 (C.D. Cal. 2013) (reviewing a proposed incentive award and stating that " 'when a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness.' " (quoting Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983))).

Estep v. Blackwell, 2006 WL 3469569, *6 (S.D. Ohio 2006) (same).

Carnegie v. Mutual Sav. Life Ins. Co., 2004 WL 3715446, *23 (N.D. Ala. 2004) (reviewing a proposed incentive award and stating that "[t]he Eleventh Circuit holds that 'a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class,' and that 'a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness' " (quoting Holmes v. Continental Can Co., 706 F.2d 1144, 1147, 1148, 31 Fair Empl. Prac. Cas. (BNA) 1707, 32 Empl. Prac. Dec. (CCH) P 33668, 36 Fed. R. Serv. 2d 817 (11th Cir. 1983))).

[8]In re Herald, Primeo, and Thema Securities Litigation, 2011 WL 4351492, *9 (S.D.N.Y. 2011) ("While incentive awards are not prohibited, they are appropriately subject to heightened judicial scrutiny at the preliminary approval stage.").

[9]*See* Rubenstein, 4 **Newberg on Class Actions** § 13:40 (5th ed.).

[10]In re Cendant Corp., Derivative Action Litigation, 232 F. Supp. 2d 327, 344 (D.N.J. 2002) ("An incentive payment to come from the attorneys' fees awarded to plaintiff's counsel need not be subject to intensive scrutiny, as the interests of the corporation, the public, and the defendants are not directly affected.").

In re Presidential Life Securities, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) ("The matter of payments of incentives to the individual plaintiffs who acted as class representatives need not be subjected to intense scrutiny inasmuch as these funds will come out of the attorney's fees awarded to plaintiffs' counsel. The interests of the class, of the public, and of the defendant are not directly affected.").

discussed elsewhere in the Treatise,[11] the practice of paying incentive awards from the attorney's fees is both rare and problematic.

The succeeding sections survey the documentation courts require,[12] the standards they impose,[13] and the practices they disfavor[14]—all of which imply meaningful judicial review. In fact, there are still many settlements in which courts simply rubber stamp approval papers submitted by the parties without sufficient attention to these payments. The fact that the payments are coming from the common fund and consequently reducing the class members' recoveries accordingly triggers the court's fiduciary duties. However, the magnitude of the incentive awards so pales in comparison to the magnitude of attorney's fees that courts likely pay less attention to them than they otherwise might precisely for that reason.

§ 17:12 Judicial review—Documentation requirement

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. As discussed elsewhere in the Treatise,[1] incentive awards are premised on the rationale that their recipients have either provided valuable service to the class and/or faced substantial risks in stepping forward to represent the class.[2] Whether the class representatives in a particular case hit this mark is a ques-

---

[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:5 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:12 (5th ed.).

[13]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:13 (5th ed.).

[14]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

[Section 17:12]

[1]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[2]Courts have articulated two other rationales for incentive awards: to incentivize class members to step forward to represent the class, and to recognize their service as private attorneys general. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.). The latter of these rationales raises few questions of fact, as the goal is achieved, to a great extent, by the provision of the service itself. At least one court, for example, approved a (reduced) incentive award in recognition of this service, even where the class representatives did very little work for the class. Michel v.

tion of fact. Accordingly, most courts require factual support for any proposed incentive award.[3] Typically, facts relevant

---

WM Healthcare Solutions, Inc., 2014 WL 497031, *11 (S.D. Ohio 2014) (rejecting a $10,000 incentive award because "the named Plaintiffs' involvement in this case was minimal and their expense in pursuing it negligible, if any" but holding that a $3,000 incentive award was appropriate because "fair class action settlement . . . would not [have been] possible were it not for the willingness of the Class Representatives to participate in this suit" and therefore "for class actions to be effectively litigated, at least one plaintiff must be [encouraged] to take on the role of class representative"). The former rationale—to incentivize class members to step forward in the first place—is sometimes framed as a factual question. *See, e.g.*, Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate *if it is necessary* to *induce* an individual to participate in the suit.") (emphasis added). Nonetheless, courts only occasionally scrutinize whether the incentive award truly induced the class representative's service. *See, e.g.*, Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *2 (D. Minn. 2013) ("Plaintiffs quote, but fail to satisfy, the prerequisite expressed in those cases that 'an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.' . . . Here, Plaintiffs have put forth no evidence or argument that persuades the Court that they required any enticement beyond their potential statutory recovery to bring this case, or that their actions in prosecuting it are deserving of a reward." (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))); Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("Kinder has not provided evidence of [any] factors the court should consider with respect to an incentive award. Moreover, in light of Kinder's pursuit of several of these types of cases, the court finds that no additional incentive is necessary beyond the $100 in statutory damages already awarded.").

[3]Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) ("A class representative must justify an incentive award through 'evidence demonstrating the quality of plaintiff's representative service,' such as 'substantial efforts taken as class representative to justify the discrepancy between [his] award and those of the unnamed plaintiffs.' " (quoting Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008))).

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437, 448–49, 2014-1 Trade Cas. (CCH) ¶ 78644 (E.D.N.Y. 2014) (finding that the declarations of corporate officers were not enough to justify incentive awards and noting that "Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award").

In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F. Supp. 2d 1040, 1090 (S.D. Tex. 2012) ("For the court to approve the incentive awards—even if they are nominal, and even if the defendant does not object—there must be some evidence in the record

to the incentive award determination are demonstrated in affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award. Courts may also receive this evidence by live testimony at the fairness hearing.[4] While courts have frequently noted the supporting documentation in approving incentive awards,[5] they regularly reject awards where the relevant facts are not suf-

---

demonstrating that the representative plaintiffs were involved. Absent such evidence, the court lacks an adequate basis to approve the incentive awards.").

But see In re Southeastern Milk Antitrust Litigation, 2013 WL 2155387, *8 n.9 (E.D. Tenn. 2013) (granting incentive awards even though "[n]o affidavits or other documentation have been submitted in support of the incentive award request" because "[c]lass representatives . . . have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations").

[4]For a discussion of the fairness hearing process, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:42 (5th ed.).

[5]**First Circuit (District Court)**

In re Prudential Insurance Company of America SGLI/VGLI Contract Litigation, 2014 WL 6968424, *7 (D. Mass. 2014) (granting incentive awards "[b]ased on the declarations of Class Counsel and the Representative Plaintiffs submitted in support of final settlement approval, [showing that] the Representative Plaintiffs have actively participated and assisted Class Counsel in this litigation for the substantial benefit of the Settlement Class despite facing significant personal limitations and sacrifices, including being deposed on deeply personal matters relating to the loss of a loved one").

Third Circuit (District Court)

In re General Instrument Securities Litigation, 209 F. Supp. 2d 423, 435, Fed. Sec. L. Rep. (CCH) P 91667 (E.D. Pa. 2001) ("I therefore conclude that upon submission of affidavits attesting to the fact that time and effort were spent by the designated class representatives pursuing this litigation and providing a general description of same, this Court will approve incentive awards.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) (rejecting an incentive award for one proposed representative due to lack of documentation but approving an award for another because he "has furnished the Court with an adequate accounting that the time he spent working on matters related to this litigation is approximately thirty-two hours" and "[b]ased on the time records and the representations made by counsel as to the activities undertaken by [the representative] on behalf of the class, the Court shall award him a class representative fee totaling

$1280 . . . from the D & T settlement fund as compensation for the actual time which he spent on this litigation").

Sixth Circuit (District Court)

Cf. In re Southeastern Milk Antitrust Litigation, 2013 WL 2155387, *8 n.9 (E.D. Tenn. 2013) (granting incentive awards even though "[n]o affidavits or other documentation have been submitted in support of the incentive award request" because the "[c]lass representatives . . . have clearly been extensively involved in the litigation, settlement discussions and court proceedings and have committed substantial time to the case as confirmed by the Court's own observations").

Seventh Circuit (District Court)

In re Southwest Airlines Voucher Litigation, 2013 WL 4510197, *11 (N.D. Ill. 2013), appeal dismissed, (7th Circ. 13-3542)(Jan. 3, 2014) (granting incentive awards based on the record and "class counsel report" showing that the plaintiffs had been active participants throughout the litigation).

Eighth Circuit (District Court)

Albright v. Bi-State Development Agency of Missouri-Illinois Metropolitan Dist., 2013 WL 4855304, *1 (E.D. Mo. 2013) ("Plaintiffs have also presented evidence regarding the contributions made by the named class representatives to the action, and the time commitment involved. The Court does not believe that such incentive payments should be granted simply as a matter of course. In light of the evidence presented in this case, however, the Court shall also approve an incentive award of $2,500.00 to each of the class representatives, based on their contributions to the case.").

Ninth Circuit (District Court)

R.H. v. Premera Blue Cross, 2014 WL 3867617, *3 n.3 (W.D. Wash. 2014) (granting preliminary approval for a settlement that included incentive awards and stating "[t]he court will accept counsel's declaration representing the time and effort undertaken by class representatives on preliminary approval. However, the court expects that the class representatives will provide declarations to the court detailing the time and effort they dedicated in support of the motion for incentive awards" (citation omitted)).

District of Columbia Circuit (District Court)

In re Lorazepam & Clorazepate Antitrust Litigation, 2003-2 Trade Cas. (CCH) ¶ 74134, 2003 WL 22037741, *10–11 (D.D.C. 2003) ("This Court has previously determined that incentive awards to named plaintiffs are not uncommon in class action litigation, particularly where a common fund has been created for the benefit of the entire class . . . Through their affidavits and the Petition for Incentives, Counsel has sufficiently explained that the named Plaintiffs 'ultimately played a role in achieving the $35,000,000 settlement.' . . . For the foregoing reasons, the Court will approve [incentive awards] in the amount of $20,000 to each of the four named Plaintiffs." (citation omitted)).

ficiently documented.[6] Courts may also provide preliminary

[6] **Second Circuit (District Court)**

In re Nassau County Strip Search Cases, 12 F. Supp. 3d 485, 503 (E.D.N.Y. 2014) (denying incentive awards because, *inter alia*, of "the absence of any information from movants concerning the concomitant costs or consequences, if any, to those class members who were deposed or testified at trial, thereby precluding an appropriate evaluation of their services").

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437, 448–49, 2014-1 Trade Cas. (CCH) ¶ 78644 (E.D.N.Y. 2014) (finding that the declarations of corporate officers were not enough to justify incentive awards and noting that "Class Counsel are expected to provide, at a minimum, documentation setting forth the approximate value of each Class Plaintiff's claim and each one's proposed incentive award").

Third Circuit (District Court)

In re General Instrument Securities Litigation, 209 F. Supp. 2d 423, 434–35, Fed. Sec. L. Rep. (CCH) P 91667 (E.D. Pa. 2001) ("I conclude that it is fair and appropriate to compensate these class representatives for time spent on matters connected with this litigation. The record, however, lacks any evidentiary support for the fact that these four representatives expended time and effort which would justify the incentive awards. Counsel for plaintiffs represented to this Court at the fairness hearing that these four individuals are worthy of such an award. No affidavits in support, however, have been submitted. I therefore conclude that upon submission of affidavits attesting to the fact that time and effort were spent by the designated class representatives pursuing this litigation and providing a general description of same, this Court will approve incentive awards. The attached Order will provide deadlines by which such submissions shall result.").

Seidman v. American Mobile Systems, 965 F. Supp. 612, 626 (E.D. Pa. 1997) (noting that the court "will compensate the class representatives for the time they spent on matters connected to the litigation" but denying an incentive award to one representative because she "has not provided the Court with any documentation as to the time which she spent on matters related to this litigation").

Fourth Circuit (District Court)

Jones v. Dominion Resources Services, Inc., 601 F. Supp. 2d 756, 768 (S.D. W. Va. 2009) (reducing proposed incentive awards because "the court has received no evidence of the class representatives' participation in this case" and the record "does not indicate that the class representatives were deposed or produced any personal documents").

Fifth Circuit (District Court)

Humphrey v. United Way of Texas Gulf Coast, 802 F. Supp. 2d 847, 869, 52 Employee Benefits Cas. (BNA) 1427 (S.D. Tex. 2011) (denying incentive award because, *inter alia,* "[w]hile Plaintiff has requested an incentive award of $10,000, significantly she has not provided any details

nor documentary support demonstrating the nature of her contribution, the hours she put in, the time consulting with counsel, time spent in discovery proceedings, or what information she provided to counsel").

Sixth Circuit (District Court)

Bessey v. Packerland Plainwell, Inc., 2007 WL 3173972, *5 (W.D. Mich. 2007) ("[U]p to this point the plaintiffs have not pointed to any specific factual or legal reasons why each class representative should receive $250 above and beyond what he or she will receive in damages under the settlement . . . [T]he record does not at this point justify the proposed extra payments.").

Seventh Circuit

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 410 (7th Cir. 2000) (affirming the district court's denial of an incentive award where counsel failed to make any serious argument in favor of such an award and where it did not appear that the lead plaintiff "had to devote an inordinate amount of time to the case or that . . . he suffered or risked any retaliation [from the defendant]").

Eighth Circuit (District Court)

Fouks v. Red Wing Hotel Corp., 2013 WL 6169209, *3 (D. Minn. 2013) (reducing proposed incentive awards to class representatives because there was "simply no evidence before the Court that the Plaintiffs faced any risks or burdens in undertaking this litigation, or that there exist any other factors that would justify the amount they seek, whether styled as an incentive award or reimbursement").

Ninth Circuit (District Court)

Davis v. Cole Haan, Inc., 2013 WL 5718452, *3 (N.D. Cal. 2013) ("Here, without any declaration from the named representatives, or any substantive description of the time devoted and work expended on this case by the named representatives, the Court finds the request for incentive payments to be woefully inadequate. Moreover, although Plaintiffs argue that they risked being held liable for Cole Haan's costs in the event of a defense judgment, there is no declaration attesting that the named representatives would have been held personally responsible, as opposed to counsel, for the costs. Therefore, the Court denies the motion for incentive payments. Again, this Order is without prejudice to a renewed motion upon a proper showing.").

Tenth Circuit (District Court)

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *11–13 (D.N.M. 2011) (denying an incentive award because, *inter alia*, the plaintiff "offer[ed] no argument or evidence . . . that other class representative were not forthcoming, and that an incentive award is justified for bringing a representative forward").

Eleventh Circuit (District Court)

Grassick v. Avatar Properties, Inc., 2008 WL 5099942, *3 (M.D. Fla. 2008) ("The parties also have failed to establish that the proposed $10,000.00 incentive payment to [the plaintiff] is appropriate. While some

approval to a settlement that includes proposed incentive awards absent documentation, but direct counsel to submit the documentation before the final approval stage.[7]

§ 17:13 Judicial review—Standards of assessment

The party seeking approval of an incentive award bears the burden of proving that the proposed recipients, typically the class representatives, deserve an award and that the proposed level of the award is reasonable. In the absence of any reference to incentive awards in Rule 23, courts have fashioned different tests for their review of proposed incentive awards. The Seventh Circuit articulated a three-part

---

courts have approved payments to class representatives to compensate them for costs they incurred during the litigation, there is no showing that [the plaintiff] has incurred any costs.").

[7]Torchia v. W.W. Grainger, Inc., 2014 WL 3966292, *11 n.3 (E.D. Cal. 2014) (preliminarily approving an incentive award but requiring the plaintiff to "provide evidence to support her request for the incentive award" prior to the fairness hearing, including "the number of hours expended, broken down by task").

Chesbro v. Best Buy Stores, L.P., 2014 WL 793362, *4 n.5 (W.D. Wash. 2014) (preliminarily approving an incentive award despite not having "any evidence of the amount of hours [the plaintiff] . . . devoted to the case," but noting that "[t]he court expects that counsel will provide evidence of the amount of time [the plaintiff] invested in this case prior to any fairness hearing").

Michel v. WM Healthcare Solutions, Inc., 2014 WL 497031, *3 (S.D. Ohio 2014) (explaining that the court had, at the preliminary approval stage, "reminded counsel that incentive awards were subject to court approval and that the named Plaintiffs would be expected to provide specific evidence demonstrating their involvement in the case in order to justify the incentive award").

Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008) (requiring that "[o]n or before the date of the fairness hearing, the parties should present or be prepared to present evidence of the named plaintiff's substantial efforts taken as class representative to justify the discrepancy between her award and those of the unnamed plaintiffs" (footnote omitted)).

In re HP Power Plug and Graphic Card Litigation, 2008 WL 2697192, *1, 3 (N.D. Cal. 2008), as corrected, (July 8, 2008) (granting incentive awards only after "plaintiffs' counsel submitted a declaration in support of incentive awards . . . assert[ing] that plaintiffs spoke to counsel in advance of filing their complaint, actively participated in reviewing the pleadings and were kept informed regarding the status of the case" after initially failing to approve the awards due to lack of supporting documentation for the request).

test in a 1998 decision,[1] and the two other circuits that have directly addressed the question—the Eighth[2] and the Ninth[3]—have each cited that test affirmatively. That said, district courts in the Ninth Circuit tend to employ a five-factor test originally set forth in a 1995 decision of the Northern District of California,[4] while courts in New York tend to employ a six-factor test.[5] As no one test has emerged

---

[Section 17:13]

[1]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("In deciding whether such an [incentive] award is warranted, relevant factors include [1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation.").

[2]In re U.S. Bancorp Litigation, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving $2,000 awards to five representative plaintiffs and citing to the Seventh Circuit's three-factor test from *Cook* in determining these awards to be "appropriate").

[3]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.'" (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

[4]Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (noting the five factors as: "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation").

[5]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007) (noting the six factors as: 1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant; 2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise); 3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim; 4) the ultimate recovery; 5) the sums awarded in similar cases; and 6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement).

as particularly salient,[6] the different tests that courts have employed can be broken down by circuit, as in the accompanying footnote.[7]

---

[6]Roberts v. Texaco, Inc., 979 F. Supp. 185, 201–02, 86 Fair Empl. Prac. Cas. (BNA) 1678 (S.D.N.Y. 1997) ("No meaningful guidelines of broad applicability are discernible from the reported decisions as to the appropriate measure for an [incentive] award, the focus being on special circumstances.").

[7]**Second Circuit (District Court)**

Sanchez v. JMP Ventures, L.L.C., 2015 WL 539506, *5 (S.D.N.Y. 2015) ("Here, [the named plaintiff] requests a service award of $10,000, to be paid from the settlement fund. [The named plaintiff] discussed the case with class counsel and was deposed, but he did not attend mediation or the fairness hearing. We have no doubt that his assistance to class counsel was useful, and for this and his willingness to accept what risks are attendant with being a named plaintiff, we believe he should receive some service award. However, under the facts presented, and in light of the total amount of the settlement fund and the large number of class members to receive payments from that fund, we reduce the amount of the service award to Sanchez to $5,000." (citation omitted)).

In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007) (noting six relevant factors in adjudicating named plaintiffs' requests for incentive awards: 1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant; 2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise); 3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim; 4) the ultimate recovery; 5) the sums awarded in similar cases; and 6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement).

Third Circuit (District Court)

Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 473 (E.D. Pa. 2000) ("[T]o be entitled to an incentive award, plaintiff must show: (1) the risks that the named plaintiff undertook in commencing class action; (2) any additional burdens assumed by named plaintiffs but not unnamed class members; and (3) the benefits generated to class members through named plaintiff's efforts.").

Fourth Circuit (District Court)

Kirven v. Central States Health & Life Co. of Omaha, 2015 WL 1314086, *13 (D.S.C. 2015) ("To determine whether an incentive payment is warranted, the court should consider the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.").

Smith v. Toyota Motor Credit Corp., 2014 WL 4953751. *1 (D. Md. 2014) ("To determine whether an incentive payment is warranted, the

The widely employed Seventh Circuit test considers three

---

court should consider 'the actions the plaintiff[s] [have] taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff[s] expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Decohen v. Abbasi, LLC, 299 F.R.D. 469, 483 (D. Md. 2014) ("To determine whether an incentive payment is warranted, the court should consider 'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Fifth Circuit (District Court)

Slipchenko v. Brunel Energy, Inc., 2015 WL 338358, *13 (S.D. Tex. 2015) ("In deciding whether an incentive award is warranted, courts look to: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the plaintiff expended in pursuing the litigation." (internal quotation marks omitted)).

In re Heartland Payment Systems, Inc. Customer Data Sec. Breach Litigation, 851 F. Supp. 2d 1040, 1089 (S.D. Tex. 2012) (same).

Sixth Circuit (District Court)

Kinder v. Dearborn Federal Sav. Bank, 2013 WL 879301, *3 (E.D. Mich. 2013) ("In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." (internal quotation marks omitted)).

In re UnumProvident Corp. Derivative Litigation, 2010 WL 289179, *9 (E.D. Tenn. 2010) ("District courts in the Sixth Circuit have considered the following factors in determining the propriety of incentive awards in class action cases: (1) the action taken by the Class Representatives to protect the interest of Class Members and others and whether these actions resulted in a substantial benefit to Class Members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class Representatives pursuing the litigation." (citing Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991))).

In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 275–76 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) ("Courts look to a number of factors in deciding whether to grant named plaintiffs incentive awards. Courts in this circuit assess the following factors: (1) whether the actions of the named plaintiffs protected the interests of the class members and have inured to the substantial benefit of the class members; (2) whether the named plaintiffs have assumed substantial indirect or direct financial risk; and (3) the amount of time and effort expended by the named plaintiffs in pursuing the class action

litigation. Additional criteria courts may consider in determining whether to approve an incentive award include: (1) the risk to the class representative in commencing the suit; (2) the notoriety and personal difficulties encountered by the class representative; (3) the duration of the litigation; (4) the extent of class representative's personal involvement in discovery; (5) the class representative's personal benefit (or lack thereof) purely in his capacity as a member of the class; and (6) the social benefit derived from the suit." (citations omitted)).

Seventh Circuit

Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998) ("In deciding whether such an [incentive] award is warranted, relevant factors include [1] the actions the plaintiff has taken to protect the interests of the class, [2] the degree to which the class has benefitted from those actions, and [3] the amount of time and effort the plaintiff expended in pursuing the litigation.").

Spicer v. Chicago Bd. Options Exchange, Inc., 844 F. Supp. 1226, 1266 (N.D. Ill. 1993) ("In considering this petition [for incentive awards], we have reviewed the following factors: (1) the actions taken by the class representatives to protect the interests of class members and others; (2) whether those actions resulted in substantial benefit to the class members; and (3) the amount of time and effort spent by the class representatives in pursuing the litigation.").

Eighth Circuit

In re U.S. Bancorp Litigation, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving $2,000 awards to five representative plaintiffs and citing to the Seventh Circuit's three-factor test from *Cook* in determining these awards to be "appropriate").

Ninth Circuit

Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Wren v. RGIS Inventory Specialists, 2011 WL 1230826, *32 (N.D. Cal. 2011), order supplemented, 2011 WL 1838562 (N.D. Cal. 2011) ("When considering a request for an incentive payment, the court must evaluate each request individually, taking into account the following factors: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the duration of the litigation and the amount of time and effort the plaintiff expended in pursing it; and (4) the risks to the plaintiff in commencing the litigation, including reasonable fears of workplace retali-

factors:

1) the actions the plaintiff has taken to protect the interests of the class;
2) the degree to which the class has benefitted from those actions; and
3) the amount of time and effort the plaintiff expended in pursuing the litigation.[8]

The five-factor test widely used in California directs courts to consider:

1) the risk to the class representative in commencing suit, both financial and otherwise;
2) the notoriety and personal difficulties encountered by the class representative;
3) the amount of time and effort spent by the class representative;
4) the duration of the litigation; and

---

ation, personal difficulties, and financial risks. Additionally, to ensure that an incentive payment is not excessive, the court must balance the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." (citations omitted) (internal quotation marks omitted)).

Tenth Circuit (District Court)

O'Brien v. Airport Concessions, Inc., 2015 WL 232191, *6 (D. Colo. 2015) ("In deciding whether such an award is warranted, 'relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.' " (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))).

Shaw v. Interthinx, Inc., 2015 WL 1867861, *8 (D. Colo. 2015) ("[I]ncentive awards are an efficient and productive way to encourage members of a class to become class representatives, and to reward the efforts they make on behalf of the class. The factors to consider in determining an incentive award include: (1) the actions that the class representative took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation." (citation omitted) (internal quotation marks omitted)).

District of Columbia Circuit (District Court)

Kifafi v. Hilton Hotels Retirement Plan, 999 F. Supp. 2d 88, 105, 57 Employee Benefits Cas. (BNA) 1941 (D.D.C. 2013) (same).

In re Lorazepam & Clorazepate Antitrust Litigation, 2003-2 Trade Cas. (CCH) ¶ 74134, 2003 WL 22037741, *10 (D.D.C. 2003) (same).

[8]Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.[9]

The six-factor test widely used in New York directs courts to consider:

1) the personal risk (if any) incurred by the named plaintiff in becoming and continuing as a litigant;
2) the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise);
3) any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course;
4) the ultimate recovery;
5) the sums awarded in similar cases; and
6) the named plaintiff's requested sum in comparison to each class member's estimated *pro rata* share of the monetary judgment or settlement.[10]

What the tests have in common is that they tend to track the rationales for incentive awards, discussed in a prior section,[11] which primarily focus on compensating class representatives for their service to the class and for the risks they took in stepping forward to represent the class. Some of the factors also attempt to guard against disfavored practices such as awards that are larger than normal and/or extravagant compared to each class member's recovery. These disfavored practices are the subject of the succeeding sections.[12]

---

[9]Wren v. RGIS Inventory Specialists, 2011 WL 1230826, *32 n.11 (N.D. Cal. 2011), order supplemented, 2011 WL 1838562 (N.D. Cal. 2011) ("In assessing the reasonableness of an inventive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken* . . ." (citing Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995))).

[10]In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *2 (S.D.N.Y. 2007).

[11]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[12]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:14 to 17:18 (5th ed.).

§ 17:14 Judicial review—Disfavored practices—Generally

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. The Ninth Circuit, for example, has emphasized that trial courts "must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives."[2] A series of disfavored practices has emerged and can be enumerated as follows:

- awarding incentive payments only to those class representatives who agree to support a settlement;[3]
- contracting in advance to pay incentive awards to class representatives;[4]
- measuring incentive payments as a percentage of the class's recovery;[5] and

[Section 17:14]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013); *see also* Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) ("The Ninth Circuit requires district courts to be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. Among other things, the concern about incentive awards and the class representative's adequacy is that, when presented with a potential settlement, the class representative may be more concerned with maximizing those incentives than with judging the adequacy of the settlement as it applies to class members at large. This is particularly salient when the incentive award is disproportionate to the class's recovery, because the disproportionality may eliminate[ ] a critical check on the fairness of the settlement for the class as a whole. In an extreme case, the conditional incentive award may be so large in relation to the judgment or settlement that if awarded it would significantly diminish the amount of damages received by the class. In such circumstances, a class representative would then have a clear conflict of interest." (citations omitted) (internal quotation marks omitted)).

[3]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:15 (5th ed.).

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:16 (5th ed.).

[5]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

- overpaying class representatives.[6]

As noted, these topics are each addressed in succeeding sections.

§ 17:15 Judicial review—Disfavored practices—Conditional awards

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is a settlement agreement that purports to reward those class representatives who agree to support the proposed settlement but not those who oppose it. The Ninth Circuit has labeled these "conditional incentive awards," because "the awards were conditioned on the class representatives' support for the settlement."[2] At least two circuits—the Seventh[3] and the Ninth[4]—have prohibited such provisions.

To appreciate the problem with conditional incentive awards, it is important to review the function of the class

---

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

[Section 17:15]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161 (9th Cir. 2013).

[3]Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014) ("Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.").

[4]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013) ("[T]he incentive awards here corrupt the settlement by undermining the adequacy of the class representatives and class counsel. In approving the settlement agreement, the district court misapprehended the scope of our prior precedents. We once again reiterate that district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives. The conditional incentive awards in this settlement run afoul of our precedents by making the settling class representatives inadequate representatives of the class.").

representative in a class action. A class action is a form of representative litigation in which one or a few members of a class litigate the claims of all of the members of the class in the aggregate.[5] Class counsel are centrally charged with safeguarding the absent class members' interests,[6] but counsel's interests and those of the class members may diverge. The class representative serves as a stand-in "client" for the whole class, monitoring the progress of the litigation and ensuring class counsel do not compromise the class's interests for their own.[7] These principles may be more ideal than practical in that most class representatives lack the expertise and resources to perform this function well.[8] Nonetheless, the principles are carefully safeguarded in the class setting.

From this perspective, conditional incentive agreements that reward only those class representatives who support a proposed settlement are problematic. When a settlement is proposed, the class representative's role is to review the proposal and to inform class counsel of her views on it. A class representative who disagrees with the terms of the settlement and so informs class counsel provides a valuable ser-

---

[5]Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members . . .").

[6]Fed. R. Civ. P. 23(g)(4) ("*Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.").

[7]*See* Rubenstein, 1 **Newberg on Class Actions** § 3:52 (5th ed.) ("In theory, the role played by the class representative in a class action is akin to the role played by an individual client in an individual case—the client tends to seek out the attorney, hire and monitor the attorney, and be the person charged with making the critical decisions about the case's goals, including, most importantly, the settlement decision. Put simply, an individual client is the principal and the attorney is her agent." (footnote omitted)).

[8]*See* Rubenstein, 1 **Newberg on Class Actions** § 3:52 (5th ed.) ("Class representatives rarely serve any of these functions in class suits: in small claims cases they have so little at stake that it would be irrational for them to take more than a tangential interest, while in all cases, including larger claim cases, class representatives generally lack the legal acumen to make key decisions about complex class action litigation, much less to monitor savvy class counsel. It has long been understood that class counsel control class actions, perhaps even selecting the class representatives themselves, thereby reversing, not inscribing, the standard attorney/client relationship. Put simply, class action attorneys are the real principals and the class representative/clients their agents." (footnote omitted)).

vice to the class regardless of whether or not her objections are ultimately validated. *First*, that class representative has exercised her own independent judgment and provided an opinion about the settlement to class counsel, providing information or insight class counsel themselves may not have considered. *Second*, that class representative speaks from a position that class counsel does not—that of the client class—and thus has provided information from a unique perspective. *Third*, that class representative has discharged precisely the duty the law seeks from her: to operate as a monitor or check on class counsel by stating her own independent opinions to class counsel and the court. Given how much class action law generally laments the absence of a meaningful check on class counsel by class representatives, those class representatives who do find the independence and voice to challenge class counsel should be applauded, not punished. A structural provision in a settlement agreement that has the effect of squelching class representatives' ability to adequately represent the class by voicing their concerns is, simply, not in the class's best interests.

The Ninth Circuit embraced these principles in a 2013 decision condemning conditional incentive awards.[9] The case was an action against credit reporting agencies under the Fair Credit Reporting Act (and its state law counterpart) for the manner in which they treated debts that had been discharged in bankruptcy. The parties initially reached an injunctive settlement and later negotiated a proposed monetary settlement. The settlement agreement provided for incentive awards, stating:

> On or before October 19, 2009, Proposed 23(b)(3) Settlement Class Counsel shall file an application or applications to the Court for an incentive award, to each of the Named Plaintiffs

---

[9]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157 (9th Cir. 2013). The Treatise's author testified as an expert witness in opposition to conditional incentive awards in the case. *See* Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1166 (9th Cir. 2013) ("Professor William Rubenstein, a class-action expert, testified before the district court that in his experience such provisions are 'not common' and that his research revealed 'not one' settlement agreement that 'contain[ed] a restriction on an incentive award like the one here that permits incentive awards be sought only for those representatives in support of the settlement.' "). The preceding paragraph is taken from Professor Rubenstein's testimony in the matter.

> serving as class representatives ***in support of the Settlement***, and each such award not to exceed $5,000.00.[10]

Class counsel also informed a plaintiff that he would "'not be entitled to anything' and that he would 'jeopardize the $5,000 [incentive award he] would receive [under the settlement]' if he did not support the settlement,"[11] and class counsel "also told the district court that they had told other plaintiffs that they 'don't see a way for people who don't support the settlement to receive an incentive award.' "[12]

Several of the class representatives objected to the settlement, believing the compensation inadequate; settling class counsel did not seek incentive awards for these class representatives as they were not representatives serving "in support of the Settlement." These representatives therefore also objected to the incentive clause itself, arguing it created a conflict of interest between themselves and the class and between class counsel and the class. The trial court rejected their argument, but the Ninth Circuit reversed. The Ninth Circuit held that the conditional incentive awards "themselves are sufficient to invalidate this settlement,"[13] reasoning that:

> With the prospect of receiving $5,000 incentive awards only if they supported the settlement, Settling Plaintiffs had very different interests than the rest of the class . . . [T]he conditional incentive awards changed the motivations for the class representatives. Instead of being solely concerned about the adequacy of the settlement for the absent class members, the class representatives now had a $5,000 incentive to support the settlement regardless of its fairness and a promise of no reward if they opposed the settlement. The conditional incentive awards removed a critical check on the fairness of the class-action settlement, which rests on the unbiased judgment of class representatives similarly situated to absent class

---

[10]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1162 (9th Cir. 2013) (emphasis added).

[11]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164 (9th Cir. 2013).

[12]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1164–65 (9th Cir. 2013).

[13]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

members.[14]

Because of the conflict between the class representatives' interests and those of the class, the Ninth Circuit held that the conditional incentive awards rendered the class representatives inadequate under Rule 23(a)(4).[15] Moreover, the Ninth Circuit held that the "class representatives' lack of adequacy—based on the conditional incentive awards—also made class counsel inadequate to represent the class."[16]

The Seventh Circuit reached a similar conclusion the following year, stating:

> Although the judge rightly made incentive awards to the class representatives who had opposed the settlement as well as to those who had approved it, the settlement agreement itself had provided for incentive awards only to the representatives who supported the settlement. This created a conflict of interest: any class representative who opposed the settlement would expect to find himself without any compensation for his services as representative.[17]

In sum, two separate circuits have found that conditional incentive awards generate a conflict of interest between class representatives and class counsel, on the one hand, and class representatives and the class, on the other. Such conditional incentive awards thereby render the class representatives and class counsel inadequate, dooming class certification and requiring the rejection of any settlement containing such terms.

§ 17:16 Judicial review—Disfavored practices—Percentage-based awards

As the legal basis for incentive awards is uncertain,[1] and

---

[14]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

[15]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

[16]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1167 (9th Cir. 2013).

[17]Eubank v. Pella Corp., 753 F.3d 718, 723, 88 Fed. R. Serv. 3d 920 (7th Cir. 2014).

[Section 17:16]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions**

as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is percentage-based incentive awards. When counsel seek, and courts approve, incentive awards, they almost always do so in specific dollar amounts. Often, courts will assess whether the requested dollar-amount award is appropriate by identifying the percentage of the class's recovery that the award represents. If the percentage seems appropriate, courts approve the award;[2] if it is too high, they either reject

---

§ 17:4 (5th ed.).

[2]**Second Circuit (District Court)**

Sanz v. Johny Utah 51 LLC, 2015 WL 1808935, *1 (S.D.N.Y. 2015) (approving incentive awards of $1,000 to three representatives and noting that "the combined payments represent less than one percent of the overall settlement").

Chambery v. Tuxedo Junction Inc., 2014 WL 3725157, *11 (W.D. N.Y. 2014) (approving proposed "enhancement payments" ($10,700) as "reasonable" and noting that this amount constituted "approximately five percent of the total settlement fund").

Gay v. Tri-Wire Engineering Solutions, Inc., 2014 WL 28640, *13–14 (E.D.N.Y. 2014) (approving $7,500 service award and noting that this figure constituted 4% of the total settlement).

Velez v. Novartis Pharmaceuticals Corp., 2010 WL 4877852, *8, 24–27 (S.D.N.Y. 2010) (approving $3,775,000 in service award payments and noting that this represented "only approximately 2.4 percent of the entire monetary award of $152.5 million (or approximately 2.1 percent of the entire value of the settlement of $175 million)" and acknowledging award was "significant . . . but in the overall context of the settlement . . . but a pittance").

Third Circuit (District Court)

Johnson v. Community Bank, N.A., 2013 WL 6185607, *6 (M.D. Pa. 2013) (approving total service awards of $10,000 and recognizing this sum as reasonable given that it comprised 0.4% of total $2.5 million settlement fund).

Sullivan v. DB Investments, Inc., 2008 WL 8747721, *37 (D.N.J. 2008) (approving incentive award and noting that it represented 0.0007% of settlement fund).

Fourth Circuit (District Court)

Kirven v. Central States Health & Life Co. of Omaha, 2015 WL 1314086, *14 (D.S.C. 2015) (approving incentive award of $7,563.27 and noting this figure constituted "approximately 0.015% of the gross settlement").

DeWitt v. Darlington County, S.C., 2013 WL 6408371, *15 (D.S.C. 2013) (approving service award of $7,500 and recognizing this amount

comprised 3.33% of gross amount of the settlement in the case, with largest proposed amount for lead plaintiff ($2,500) constituting 1.11% of gross settlement amount).

Fifth Circuit (District Court)

Jenkins v. Trustmark Nat. Bank, 300 F.R.D. 291, 306 (S.D. Miss. 2014) (approving seven service awards of $5,000 each in part due to recognition that this aggregate sum constituted "less than one percent of the Settlement Fund").

Sixth Circuit (District Court)

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan, 2015-1 Trade Cas. (CCH) ¶ 79151, 2015 WL 1498888, *18–19 (E.D. Mich. 2015) (granting $165,000 in incentive awards and noting that these awards were "reasonable" as they constituted 0.55% of settlement fund).

In re Cardizem CD Antitrust Litigation, 218 F.R.D. 508, 535, 2003-2 Trade Cas. (CCH) ¶ 74205 (E.D. Mich. 2003) (approving incentive awards of $160,000 and recognizing these awards to equal just 0.002% of settlement fund).

Seventh Circuit (District Court)

Beesley v. International Paper Company, 2014 WL 375432, *4 (S.D. Ill. 2014) (approving seven incentive awards (six of $25,000 and one of $15,000) and noting that "the total award for all of the Named Plaintiffs represents just 0.55 percent of the total Settlement Fund" and that "awards of less than one percent of the fund are well within the ranges that are typically awarded in comparable cases").

In re Lawnmower Engine Horsepower Marketing & Sales Practices Litigation, 733 F. Supp. 2d 997, 1016 (E.D. Wis. 2010) (approving incentive awards of $1,000 to each of the 132 class representatives based in part because "the $132,000 total award is only a tiny percentage (0.12%) of the class's overall recovery [of $110.7 million]").

Eighth Circuit (District Court)

Sauby v. City of Fargo, 2009 WL 2168942, *3 (D.N.D. 2009) (approving incentive awards totaling $15,000 and noting that this sum constituted only 0.01% of the maximum class recovery).

Ninth Circuit (District Court)

Horn v. Bank of America, N.A., 2014 WL 1455917, *7–8 (S.D. Cal. 2014) (approving incentive awards collectively amounting to $50,000 in part because this aggregate figure would constitute "a mere fraction of one percent of the most conservative estimated value of the Settlement").

Williams v. Centerplate, Inc., 2013 WL 4525428, *7 (S.D. Cal. 2013) (approving $5,000 incentive awards for each of three plaintiffs and recognizing this figure as "reasonable" as it comprised "around 2.3% of the common fund").

Cicero v. DirecTV, Inc., 2010 WL 2991486, *7 (C.D. Cal. 2010) (approving two incentive awards totaling $12,500 in part because of court's recognition that this sum constituted "less than one percent of the Settlement").

or reduce the award.[3] This method is similar to a percentage cross-check that a court might utilize in assessing the validity of a lodestar-based fee award.[4] There are therefore many court decisions that discuss incentive awards in percentage terms.

However, there are very, very few cases in which class counsel have sought, and courts have approved, incentive awards that are actually measured as a percentage of the common fund recovery.[5] Percentage-based incentive awards

---

Hopson v. Hanesbrands Inc., 2009 WL 928133, *10 (N.D. Cal. 2009) (approving incentive award of $5,000, constituting approximately 1.25% of the settlement amount, and noting that although this was higher than that awarded in other cases, the award was justified under the particular circumstances of the case).

Tenth Circuit (District Court)

Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *1 (W.D. Okla. 2015) (approving "case contribution award" and recognizing this award as comprising 1% of total settlement amount).

Shaw v. Interthinx, Inc., 2015 WL 1867861, *8 (D. Colo. 2015) (approving multiple $10,000 incentive awards and noting that the total sum would represent "less than 1% of the maximum value of the common fund").

Eleventh Circuit (District Court)

Carnegie v. Mutual Sav. Life Ins. Co., 2004 WL 3715446, *24 (N.D. Ala. 2004) (approving incentive awards aggregating $10,000, which the court noted constituted "two-tenths of one percent of the total settlement amount").

District of Columbia Circuit (District Court)

In re Lorazepam & Clorazepate Antitrust Litigation, 205 F.R.D. 369, 400, 2002-1 Trade Cas. (CCH) ¶ 73649 (D.D.C. 2002) (approving six separate incentive awards (three worth $25,000 and three worth $10,000) and noting that this aggregate sum represented approximately 0.3% of each class's recovery).

[3]A succeeding section of the Treatise discussing courts' rejection of excessive awards contains a list of cases rejecting awards on the basis that they constitute too great a portion of the class's recovery. *See* Rubenstein, 5 **Newberg on Class Actions** § 17:18 (5th ed.).

[4]For a discussion of the percentage cross-check in lodestar fee cases, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:52 (5th ed.).

[5]Chieftain Royalty Co. v. Laredo Petroleum, Inc., 2015 WL 2254606, *4 (W.D. Okla. 2015) ("Class Representative is hereby awarded a Case Contribution Award of one percent (1%) of the $6,651,997.95 Settlement Amount.").

Allapattah Services, Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) ("[T]he Class Representatives are seeking 1.5% of

are disfavored, if not altogether forbidden.

Percentage-based incentive awards may appear appropriate in that they seem to align the class representative's interests with those of the class: the more money the class makes, the higher the percentage award.[6] However, on closer examination, percentage-based incentive awards are problematic. *First*, such awards may skew the class representatives' incentives by encouraging them to hold out for greater recovery (and hence a higher incentive award) when in fact the class's interests would be best served by a settlement. *Second,* relatedly, percentage awards privilege monetary recoveries over other remedies, such as injunctive relief, creating a potential conflict between the interests of the class representative and the class.[7] *Third*, paying the class representatives a portion of the settlement amount

---

the common benefit received by the Class as an incentive award. The basis for the 1.5% request comes from the fact that Class Counsel have reduced their fee from 33 and 1/3% to 31 and 1/3%, and the Class Representatives have sought to maintain their request within the scope of that reduction.").

Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (affirming district court's award of incentive award equal to "1% of the common fund" ($34,500)).

[6]Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) ("[W]e can find no reason to automatically deny incentive awards that are based upon a percentage of the common fund. We do not consider such awards as antithetical to the interests of the class. To the contrary, the class representative remains aligned with the interests of the class as a whole; the larger the class recovery, the larger the incentive award.").

[7]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959–60, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that *ex ante* incentive agreements between class counsel and class representatives, which tied the requested award to the size of the settlement, "made the contracting class representatives' interests actually different from the class's interests[;]" specifically, "[b]y tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class," because (given a cap on the percentage recovery) "once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement" and because the "agreements also gave the contracting representatives an interest in a monetary settlement, as distinguished from other remedies, that set them apart from other members of the class").

untethers the award from the services that the representatives provided to the class and the risks they took in doing so. It is true that a court could provide a higher percentage when the service and risks were greater, but scaling those rewards according to the size of the common fund is at best a rough proxy in that the services and risks are not necessarily directly related to the size of the settlement. Thus, *fourth,* percentage awards threaten to be excessive.[8] *Fifth*, paying the class representatives a portion of the settlement fund is simply unseemly: it gives the appearance that the representative is either a professional plaintiff,[9] or a bounty hunter, not a servant for the class.[10]

In a leading decision on incentive awards, the Ninth Circuit held that an agreement between class counsel and the class representatives at the outset of the case that tied the amount class counsel would seek as an incentive award to the class's recovery created a conflict of interest between the class representatives and the class, rendering those class representatives inadequate to represent the class.[11] The decision does not isolate the issue of rewarding class representatives with a percentage-based incentive fee, but its concerns about scaling the incentive award to the class's recovery are pertinent.[12]

In short, class counsel rarely seek incentive awards in per-

---

[8]*Cf.* Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (rejecting defendant's argument that the percentage approach "provides a disproportionate recovery to that of other class members" but performing "lodestar" type cross-check to confirm reasonableness of proposed percentage incentive award).

[9]*But see* Freebird, Inc. v. Cimarex Energy Co., 46 Kan. App. 2d 631, 264 P.3d 500, 511 (2011) (rejecting defendant's argument that percentage approach "encourages individuals to become professional plaintiffs").

[10]In this sense, the class representative's service, and reward, are distinct from the statutorily based reward structure in *qui tam* cases, where a relator is paid a percentage of the government's recovery for her whistle-blower activities. *See* 31 U.S.C.A. § 3730 (setting forth False Claims Act's *qui tam* provisions).

[11]Rodriguez v. West Publishing Corp., 563 F.3d 948, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009). For a discussion of this case and the concerns it posed, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:17 (5th ed.).

[12]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that incentive agreements tying any potential award to the ultimate recovery

centage terms. Although courts may check a flat award for excessiveness by reference to the percentage of the fund it represents, courts rarely award incentive payments in percentage terms and strongly disfavor such an approach.

§ 17:17 Judicial review—Disfavored practices—*Ex ante* incentive award agreements

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those disfavored practices is an *ex ante* agreement between putative class counsel and putative class representatives containing certain assurances with regard to incentive awards.

The facts of the primary precedent on point[2] are instructive: in 2005, lawyers in California brought an antitrust class action against West Publishing Company alleging that it had engaged in anti-competitive practices with regard to its bar preparation course, BAR/BRI. As may be evident, the class consisted almost exclusively of lawyers.[3] Some of those lawyers/clients shopped for class action counsel to represent them in suing BAR/BRI. In so doing, they appear to have negotiated, up front, for the lawyers to promise to pursue incentive agreements on their behalf at the conclusion of the case. In particular, the putative class representatives negotiated an agreement with putative class counsel whereby counsel promised to seek a higher award for them as the class's recovery increased, up to a certain

---

"put counsel and the contracting class representatives into a conflict from day one").

[Section 17:17]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]Rodriguez v. West Publishing Corp., 563 F.3d 948, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[3]The class consisted of "those who purchased a BAR/BRI course between August 1, 1997 and July 31, 2006." Rodriguez v. West Publishing Corp., 563 F.3d 948, 954, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009). The class would also have included persons who paid for the bar preparation course but either did not sit for the bar, did not pass the bar, or were not admitted to the bar.

cap.[4] This agreement was not revealed to the court at either the class certification stage or the settlement stage, but it came to light after several objectors protested the size of the proposed incentive awards.[5] Without apparently realizing the consequences of their actions, class counsel at that point revealed that they were contractually obligated to seek that level of award. The district court ultimately approved the settlement, but held that the agreements were inappropriate and contrary to public policy for a number of reasons:

> [1] they obligate class counsel to request an arbitrary award not reflective of the amount of work done, or the risks undertaken, or the time spent on the litigation; [2] they create at least the appearance of impropriety; [3] they violate the California Rules of Professional Conduct prohibiting fee-sharing with clients and among lawyers; and [4] they encourage figurehead cases and bounty payments by potential class counsel. [5] The court found it particularly problematic that the incentive agreements correlated the incentive request solely to the settlement or litigated recovery, as the effect was to make the contracting class representatives' interests actually different from the class's interests in settling a case instead of trying it to verdict, seeking injunctive relief, and insisting on compensation greater than $10 million. [6] It further observed that the parties' failure to disclose their agreement to the court, and to the class, violated the contracting representatives' fiduciary duties to the class and duty of candor to the court.[6]

The Ninth Circuit affirmed the settlement's approval because it found that two independently-represented class

---

[4]Rodriguez v. West Publishing Corp., 563 F.3d 948, 957, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) ("The incentive agreements obligated class counsel to seek payment . . . in an amount that slid with the end settlement or verdict amount: if the amount were greater than or equal to $500,000, class counsel would seek a $10,000 award for each of them; if it were $1.5 million or more, counsel would seek a $25,000 award; if it were $5 million or more, counsel would seek $50,000; and if it were $10 million or more, counsel would seek $75,000.").

[5]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (noting that "the incentive agreements came to the fore when Objectors pounced on them in opposing class counsel's motion for incentive awards to the class representatives"). The Treatise's author was an expert witness regarding a fee request that was later filed by some of these objectors' lawyers.

[6]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

representatives did not suffer under the weight of the incentive agreements.[7] However, the Ninth Circuit did agree with the district court that the *ex ante* incentive agreements were contrary to public policy, discussing a host of problems with respect to the agreements:

- *Class representatives suffer conflict of interest.* The Ninth Circuit noted the fact that the agreements "tied the promised request to the ultimate recovery . . . put class counsel and the contracting class representatives into a conflict position from day one."[8] The court found that "[b]y tying their compensation—in advance—to a sliding scale based on the amount recovered, the incentive agreements disjoined the contingency financial interests of the contracting representatives from the class. As the district court observed, once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would put their $75,000 at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement. The agreements also gave the contracting representatives an interest in a monetary settlement, as distinguished from other remedies, that set them apart from other members of the class."[9]
- *Class counsel suffer conflict of interest.* The Ninth Circuit found that class counsel's simultaneous representation of parties with conflicting interests (the class representatives and the class) "implicate California ethics rules that prohibit representation of clients with

---

[7]Rodriguez v. West Publishing Corp., 563 F.3d 948, 961, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) ("[W]e do not believe the district court was required to reject the settlement for inadequate representation. Only five of the seven class representatives had an incentive agreement. 'The adequacy-of-representation requirement is satisfied as long as one of the class representatives is an adequate class representative.' . . . Accordingly, we conclude that the presence of conflicted representatives was harmless." (citation omitted) (quoting Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 n.2, 17 I.E.R. Cas. (BNA) 796, 143 Lab. Cas. (CCH) P 10958, 50 Fed. R. Serv. 3d 511 (9th Cir. 2001), for additional opinion, see, 7 Fed. Appx. 753 (9th Cir. 2001))).

[8]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[9]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959–60, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

conflicting interests."[10]

- *Class counsel's entitlement to a fee is plausibly barred.* The Ninth Circuit, again relying on California ethics principles, noted that, "[s]imultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification" and that under California law, "[a]n attorney cannot recover fees for such conflicting representation."[11]
- *Lack of transparency.* The Ninth Circuit further noted that such agreements must be disclosed at the class certification stage of the lawsuit "where it [is] plainly relevant" because "the district court would certainly have considered its effect in determining whether the conflicted plaintiffs . . . could adequately represent the class. The conflict might have been waived, or otherwise contained, but the point is that uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry."[12]
- *Excessiveness.* Referencing an earlier decision concerning the potential excessiveness of incentive awards, the Ninth Circuit stated that "excess incentive awards may put the class representative in a conflict with the class and present a 'considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations.' The danger is exacerbated if the named plaintiffs have an advance guarantee that a request for a relatively large incentive award will be made that is untethered to any service or value they

[10]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[11]Rodriguez v. West Publishing Corp., 563 F.3d 948, 967–68, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (quoting Image Technical Service, Inc. v. Eastman Kodak Co., 136 F.3d 1354, 1358, 1998-1 Trade Cas. (CCH) ¶ 72067 (9th Cir. 1998)) (internal quotation marks omitted).

[12]Rodriguez v. West Publishing Corp., 563 F.3d 948, 959, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

will provide to the class."[13]

- *Class Action Abuse.* The Ninth Circuit also stated that "agreements of this sort infect the class action environment with the troubling appearance of shopping plaintiffships. If allowed, ex ante incentive agreements could tempt potential plaintiffs to sell their lawsuits to attorneys who are the highest bidders, and vice-versa."[14]

Summarizing its decision, the Ninth Circuit stated:

> We conclude that incentive agreements, entered into as part of five named plaintiffs' retainer agreement with counsel, created conflicts among them (later certified as class representatives), their counsel (later certified as class counsel), and the rest of the class. It was inappropriate not to disclose these agreements at the class certification stage, because an ex ante incentive agreement is relevant to whether a named plaintiff who is party to one can adequately represent the class.[15]

While there are a variety of moving parts in the *Rodriguez* case, the decision is fairly damning of *ex ante* incentive agreements, *per se*. It is true that much of the court's concern stemmed from the content of the particular agreement—the sliding scale arrangement and the conflicts it created—but counsel's commitment *ex ante* to seek an incentive award for a putative class representative understandably troubled the court: such an award largely turns on the work the representative undertakes and the risks she faces, neither of which can be fully known *ex ante*. A commitment to seek some of the class's money from a potential recovery to serve these purposes therefore creates a conflict between the proposed class representative and the putative class, as well as between contracting class counsel and the putative class. It would thus not be too much of a stretch to read *Rodriguez* as condemning any *ex ante* agreement that counsel would make to pursue an incentive award. At the least, *Rodriguez* stands for the proposition that such an agreement would

---

[13]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009) (quoting Staton v. Boeing Co., 327 F.3d 938, 976–77, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003)).

[14]Rodriguez v. West Publishing Corp., 563 F.3d 948, 960, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

[15]Rodriguez v. West Publishing Corp., 563 F.3d 948, 968, 2009-1 Trade Cas. (CCH) ¶ 76614, 60 A.L.R.6th 723 (9th Cir. 2009).

have to be disclosed at the class certification stage and the settlement stage of the lawsuit; any lack of transparency about such an agreement would consequently threaten to undermine certification and settlement as well.

§ 17:18 Judicial review—Disfavored practices—Excessive awards

As the legal basis for incentive awards is uncertain,[1] and as such payments tend to be made with the class's money, courts have been somewhat careful in policing certain incentive award practices. One of those practices is excessive incentive awards.

As discussed in a previous section of the Treatise,[2] a primary risk of incentive awards is that they skew the class representative's interests so as to conflict with those of the class she purports to serve. As most class suits are for small amounts of money, a hypothetical case might encompass claims worth $250 per class member with a settlement value of say, $100 per class member. If a settlement is proposed that returns a $20 voucher to each class member, but the class representative is promised a $15,000 incentive award if the settlement is approved, she may forgo resisting the questionable settlement on behalf of the class as she stands to profit so handsomely should it be approved.[3] Courts have therefore long attempted to ensure that the size of potential

---

[Section 17:18]

[1]For a discussion, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:4 (5th ed.).

[2]*See* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[3]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1163 (9th Cir. 2013) (noting that in an earlier case, the court had "reversed the district court's approval of a class-action settlement because the settlement provided for disproportionately large payments to class representatives" and explaining that such a settlement "magnified the risks associated with incentive awards because the awards there were much larger than the payments to individual class members, 'eliminat-[ing] a critical check on the fairness of the settlement for the class as a whole' " (quoting Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003))).

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("[A]pplications for incentive awards are scrutinized carefully by courts who sensibly fear that incentive awards may lead named plaintiffs to expect a bounty for bringing suit or to com-

incentive awards are not excessive, lest the class representative's interests so significantly diverge from those of the class that she ceases to be an adequate representative of the class under Rule 23(a)(4).[4]

The Sixth Circuit explained this rationale in a case involving allegations that a certain diaper caused baby rash.[5] After a study disproved the link between the diaper and the rash, the parties settled for some minor forms of relief,[6] while the named class representatives were promised $1,000 "per af-

---

promise the interest of the class for personal gain." (quoting **Newberg on Class Actions**)).

Sanz v. Johny Utah 51 LLC, 2015 WL 1808935, *1 (S.D.N.Y. 2015) ("Before awarding an incentive payment . . . a court must ensure that the named plaintiffs, as fiduciaries to the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members." (internal quotation marks omitted)).

Partridge v. Shea Mortg. Inc., 2008 WL 5384542, *1 (N.D. Cal. 2008) (denying plaintiffs' motion for an incentive payment in the amount of $15,000 because the plaintiff had not established any of the five factors tending to support incentive payments, and expressing concern that incentive payments might induce class representatives to accept settlements that serve their personal interests rather than the best possible result for the class as a whole).

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) ("If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.").

[4]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161 (9th Cir. 2013) ("Moreover, the conditional incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval. Because these circumstances created a patent divergence of interests between the named representatives and the class, we conclude that the class representatives and class counsel did not adequately represent the absent class members, and for this reason the district court should not have approved the class-action settlement.").

[5]In re Dry Max Pampers Litigation, 724 F.3d 713, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[6]In re Dry Max Pampers Litigation, 724 F.3d 713, 716, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("P & G agreed to reinstate, for one year, a refund program that P & G had already made available to its customers from July 2010 to December 2010. The program limits refunds to one box per household, and requires consumers to provide an original receipt and UPC code clipped from a Pampers box. P & G also agreed, for a period of two years, to add to its Pampers box-label a single sentence suggesting that consumers 'consult Pampers.com or call 1-800-Pampers' for 'more in-

fected child" and class counsel was to receive $2.73 million in attorney's fees.[7] The district court approved the settlement with seemingly little review[8] and the Sixth Circuit reversed. The Sixth Circuit explicitly took no position on the propriety of incentive payments in general, but characterized such payments to the class representatives and the payment to the class members as "two separate settlement agreements folded into one,"[9] with the former being so great that the class representatives had "no interest in vigorously prosecuting the [interests of] unnamed class members."[10] Summarizing its position, the court stated:

> The propriety of incentive payments is arguably at its height when the award represents a fraction of a class representative's likely damages; for in that case the class representative is left to recover the remainder of his damages by means of the same mechanisms that unnamed class members must re-

---

formation on common diapering questions such as choosing the right Pampers product for your baby, preventing diaper leaks, diaper rash, and potty training[.]' P & G similarly agreed, for a period of two years, to add to the Pampers website some rudimentary information about diaper rash (*e.g.*, '[d]iaper rash is usually easily treated and improves within a few days after starting treatment') and a suggestion to '[s]ee your child's doctor' if certain severe symptoms develop (*e.g.*, 'pus or weeping discharge'), along with two links to other websites. P & G also agreed to contribute $300,000 to a pediatric resident training program—the recipient program is not identified in the agreement—and $100,000 to the American Academy of Pediatrics to fund a program 'in the area of skin health.' ").

[7]In re Dry Max Pampers Litigation, 724 F.3d 713, 716, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013).

[8]In re Dry Max Pampers Litigation, 724 F.3d 713, 717, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) ("The district court entered its 'Final Approval Order and Final Judgment' later that afternoon [of the fairness hearing]. With the exception of a few typographical changes, the order was a verbatim copy of a proposed order that the parties had submitted to the court before the hearing. The order was conclusory, for the most part merely reciting the requirements of Rule 23 in stating that they were met. About [a class member's] objections, the order had nothing to say.").

[9]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013); *see also* Women's Committee For Equal Employment Opportunity (WC=EO) v. National Broadcasting Co., 76 F.R.D. 173, 180, 19 Fair Empl. Prac. Cas. (BNA) 1703, 15 Empl. Prac. Dec. (CCH) P 7832, 24 Fed. R. Serv. 2d 359 (S.D.N.Y. 1977) ("[W]hen representative plaintiffs make what amounts to a separate peace with defendants, grave problems of collusion are raised.").

[10]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (internal quotation marks omitted).

> cover theirs. The members' incentives are thus aligned. But we should be most dubious of incentive payments when they make the class representatives whole, or (as here) even more than whole; for in that case the class representatives have no reason to care whether the mechanisms available to unnamed class members can provide adequate relief.
>
> This case falls into the latter scenario. The $1000-per-child payments provided a *disincentive* for the class members to care about the adequacy of relief afforded unnamed class members, and instead encouraged the class representatives to compromise the interest of the class for personal gain. The result is the settlement agreement in this case. The named plaintiffs are inadequate representatives under Rule 23(a)(4), and the district court abused its discretion in finding the contrary.[11]

The Sixth Circuit's concern in the *Pampers* case was one of proportionality, comparing the size of the incentive award to the size of each class member's individual reward. The Ninth Circuit has expressed concern, as well, about the number of persons receiving such special payment and the relationship of the total amount of special payments to the total settlement in the case.[12]

Courts have found incentive payments to be excessive in four sets of circumstances:

- when the raw number seems too high;[13]
- when the amount sought is disproportionate to the contributions of the named plaintiffs;[14]
- when the amount of the incentive award is far greater than the amount of compensation each individual class

---

[11]In re Dry Max Pampers Litigation, 724 F.3d 713, 722, 86 Fed. R. Serv. 3d 216 (6th Cir. 2013) (citation omitted) (internal quotation marks omitted).

[12]Staton v. Boeing Co., 327 F.3d 938, 977, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("[T]he different orders of magnitude in the present case concerning the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment—here up to $50,000, with an average of more than $30,000—are obvious.").

[13]In re Southern Ohio Correctional Facility, 175 F.R.D. 270, 277 (S.D. Ohio 1997), order rev'd on other grounds, 24 Fed. Appx. 520 (6th Cir. 2001) (declining to approve a proposed incentive award of $25,000 for prison inmate plaintiffs because, *inter alia*, "the requested $25,000 is extremely disproportionate to the amount an inmate can earn otherwise").

[14]**First Circuit (District Court)**

In re Puerto Rican Cabotage Antitrust Litigation, 815 F. Supp. 2d 448, 469 (D.P.R. 2011) ("While the Court notes the named plaintiffs' involvement in advancing the present litigation, the Court finds that the amount of the incentive award requested is excessive and unreasonable. The Class Representatives did not undertake substantial risk or suffer notoriety or personal hardships by acting as a named plaintiff. There is no indication that [the Class Representatives] assumed a risk or inconvenience not shared by the other class members which is of such magnitude to merit an incentive award, and Plaintiffs do not provide specific evidence of the purported risk's magnitude." (footnote omitted) (international quotation marks omitted)).

Second Circuit (District Court)

Weseley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720, Fed. Sec. L. Rep. (CCH) P 94403 (E.D.N.Y. 1989) (rejecting request for $5,000 incentive award because although plaintiff "took time away from his practice to respond to defendant's document request and to be deposed[,] [b]eyond these normal obligations of class representation . . . he did not perform any extraordinary services to the class").

Third Circuit (District Court)

In re Laidlaw Securities Litigation, 1992 WL 236899, *3 (E.D. Pa. 1992) ("Plaintiffs' counsel also request that the court grant an incentive award of $10,000, to be paid out of plaintiffs' counsel's awarded fees, to the lead plaintiff, Donald Singleton. This award would be paid to Mr. Singleton in addition to the payment he would receive out of the settlement fund as a class member. The court perceives no reason for treating Mr. Singleton any differently from other members of the class. There is no indication that Mr. Singleton, by acting as the named class representative, has assumed a risk or inconvenience not shared by the other class members which is of such magnitude to merit the award of an additional $10,000. Therefore, the request to grant an incentive award to the named class representative is denied.").

Ninth Circuit (District Court)

Krzesniak v. Cendant Corp., 2008 WL 4291539, *1 (N.D. Cal. 2008) ("As to the amount of the incentive award, the Court finds it excessive. First, the Court notes that Plaintiff does not specify the amount of time and effort he spent on this case. Second, in arguing that $15,000 is at the modest end of the incentive award spectrum, he cites to cases that are clearly distinguishable. In [a prior case] the court awarded $20,000 to each of two named plaintiffs, finding that each plaintiff 'spent in excess of 500 hours' time at counsels' request' in the litigation. Here, there is no evidence before the Court that Plaintiff himself spent anywhere near this amount of time on the present case." (quoting Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32, 1985-1 Trade Cas. (CCH) ¶ 66510 (E.D. Pa. 1985))).

In re Heritage Bond Litigation, 2005 WL 1594403, *18 (C.D. Cal. 2005) (approving incentive awards to named plaintiffs but reducing the requested sums because, *inter alia*, "no declaration submitted accurately quantifies how Lead Plaintiffs spent their time during this litigation,"

member is entitled to receive; and,[15]

"[t]he Court is only presented with blanket statements as to how Class Representatives participated in this action," and "there is no showing that Lead Plaintiffs' participation placed them at risk of damaged reputation or retaliation").

Tenth Circuit (District Court)

In re Sprint Corp. ERISA Litigation, 443 F. Supp. 2d 1249, 1271, 39 Employee Benefits Cas. (BNA) 2810 (D. Kan. 2006) ("As to plaintiffs' request for an award of $15,000 to each of the named plaintiffs . . . the court simply cannot find that such an award is reasonable. The court certainly recognizes that the time these individuals devoted to this lawsuit inured to the common benefit of the class and, to that end, the court believes they are entitled to some type of incentive award above and beyond what the typical class member is receiving. They have performed an important service to the class and the burden of this commitment deserves to be recognized through an award. But, although the aggregate value of the settlement is significant, no class member stands to gain more than $1,000 on an average, per-plaintiff basis. The named plaintiffs devoted approximately 80 hours, on average, to this lawsuit. The court believes that an award of $5,000 adequately compensates each of them for their time.").

[15]**Second Circuit (District Court)**

In re AOL Time Warner ERISA Litigation, 2007 WL 3145111, *3 n.10 (S.D.N.Y. 2007) (noting that "the Court concludes that the requested $20,000 per-plaintiff fee would be excessive, especially in light of the indirect, and much smaller, monetary relief accruing to the more than 65,000 absent class members" and stating that the "Court has taken proportionality into account . . . [as] the primary justification offered for the reduction of the incentive award").

Sheppard v. Consolidated Edison Co. of New York, Inc., 2002 WL 2003206, *6 (E.D.N.Y. 2002) ("Although these reasons support an award of incentive payments, I decline to award incentive payments in the extraordinarily high amounts requested. Once again, I find that the amounts sought as incentive awards are grossly disproportionate to the compensation to be paid to the absent class members the plaintiffs seek to represent. In my view, appropriate incentive awards here are one-sixth of the proposed maximum amounts . . .").

Ninth Circuit

Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1161, 1165 (9th Cir. 2013) (holding that the "incentive awards significantly exceeded in amount what absent class members could expect to get upon settlement approval" thereby creating a "patent divergence of interests between the named representatives and the class" and stating that "[t]here is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards").

Staton v. Boeing Co., 327 F.3d 938, 946, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) ("Finally, the decree sets up a two-tiered structure for the

- when the aggregate amount of incentive awards constitutes too great a portion of the class's full recovery.[16]

---

distribution of monetary damages, awarding each class representative and certain other identified class members an amount of damages on average sixteen times greater than the amount each unnamed class member would receive. At least one person not a member of the class was provided a damages award. The record before us does not reveal sufficient justification either for the large differential in the amounts of damage awards or for the payment of damages to a nonmember of the class. On this ground as well, the district court abused its discretion in approving the settlement.").

Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) (denying preliminary approval of the settlement because "[t]he $10,000 currently earmarked for [the class representative] is more than 7 percent of the total settlement fund, more than 15 percent of the total amount of the common fund earmarked for the class, and more than 37 times the $269 average net recovery of the unnamed class members").

Wallace v. Countrywide Home Loans, Inc., 22 Wage & Hour Cas. 2d (BNA) 849, 2014 WL 5819870, *4 (C.D. Cal. 2014) (reducing requested incentive awards from $50,000 to $1,500 for each named plaintiff because "individual class members are entitled to receive no more than $1,500 under the settlement," and noting that "[a]n incentive award 33 times greater than the maximum possible recovery of other individual class members creates a 'significant disparity,' " particularly as the named plaintiffs did not appear to have suffered "any particular risks or hardships caused by their participation in this litigation").

Tenth Circuit (District Court)

In re Sprint Corp. ERISA Litigation, 443 F. Supp. 2d 1249, 1271, 39 Employee Benefits Cas. (BNA) 2810 (D. Kan. 2006) (reducing requested incentive awards from $15,000 to $5,000 for each named plaintiff, despite multi-million dollar settlement amount, because, *inter alia*, no individual class member stood to recover more than $1,000 from the settlement).

[16]**Second Circuit (District Court)**

Ramirez v. Ricoh Americas Corp., 2015 WL 413305, *5 (S.D.N.Y. 2015) ("The fact that the plaintiff requests $20,000, or 5.71% of the settlement fund, as his service award, and there is absent from the motion record any evidence of the reaction of putative class members to the settlement, are of concern to the Court. The Court finds that this factor does not militate in favor of granting the plaintiff's motion.").

Gortat v. Capala Bros., 949 F. Supp. 2d 374, 378, 22 Wage & Hour Cas. 2d (BNA) 1407 (E.D.N.Y. 2013), aff'd, 568 Fed. Appx. 78, 22 Wage & Hour Cas. 2d (BNA) 1420 (2d Cir. 2014) (declining to grant incentive awards that would have constituted 61.74% of the total award granted to all plaintiffs, calling this amount "breathtaking" and explaining that it would have been "an exercise of discretion inexcusably abused").

Sheppard v. Consolidated Edison Co. of New York, Inc., 2002 WL 2003206, *6 (E.D.N.Y. 2002) ("In awarding these payments as part of a

Among these practices, perhaps the starkest and surely

---

settlement, a court must ensure that the named plaintiffs, as fiduciaries to the class, have not been tempted to receive high incentive awards in exchange for accepting suboptimal settlements for absent class members. A particularly suspect arrangement exists where the incentive payments are greatly disproportionate to the recovery set aside for absent class members . . .").

Dornberger v. Metropolitan Life Ins. Co., 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (approving incentive awards because, *inter alia*, "these incentive awards are small in relation to the $13 million . . . fund from which the awards will be made").

Ninth Circuit

Staton v. Boeing Co., 327 F.3d 938, 948, 978, 55 Fed. R. Serv. 3d 1299 (9th Cir. 2003) (striking settlement and denying incentive awards because, *inter alia*, the named plaintiffs constituted "less than two percent of the class" but would have received "more than half the monetary award").

Chavez v. Lumber Liquidators, Inc., 2015 WL 2174168, *4 (N.D. Cal. 2015) (denying preliminary approval of settlement because "[t]he $10,000 currently earmarked for [the class representative] is more than 7 percent of the total settlement fund, more than 15 percent of the total amount of the common fund earmarked for the class, and more than 37 times the $269 average net recovery of the unnamed class members").

Bellinghausen v. Tractor Supply Company, 306 F.R.D. 245, 266 (N.D. Cal. 2015) (denying a $15,000 award in part because this would have constituted "2 percent of the gross settlement funds, which is higher than what other courts have found to be acceptable").

Ontiveros v. Zamora, 2014 WL 3057506, *9 (E.D. Cal. 2014) ("An incentive award consisting of one percent of the common fund is unusually high, and some courts have been reticent to approve incentive awards that constituted an even smaller portion of the common fund.").

Daniels v. Aeropostale West, Inc., 22 Wage & Hour Cas. 2d (BNA) 1276, 2014 WL 2215708, *7 (N.D. Cal. 2014) (denying $5,000 incentive award because the request was "excessive" considering that the total proposed settlement amount was $8,645.61).

Ko v. Natura Pet Products, Inc., 2012 WL 3945541, *15 (N.D. Cal. 2012), appeal dismissed, (9th Cir. 12-17296)(Apr. 24, 2013) (reducing incentive award to $5,000 because the requested sum of $20,000 would have been "excessive under the circumstances" as it would have constituted "approximately 1% percent [sic] of the gross settlement amount").

Sandoval v. Tharaldson Employee Management, Inc., 2010 WL 2486346, *10 (C.D. Cal. 2010) (reducing incentive award to $7,500 because this figure constituted "1% of the gross settlement" and noting that the requested sum of $12,500 would have been "excessive under the circumstances").

Krzesniak v. Cendant Corp., 2008 WL 4291539, *2 (N.D. Cal. 2008) (reducing incentive award from $15,000 to $1,500 and noting that approved incentive awards in three other cases represented 0.001%, 0.007%,

the most beguiling is the relationship between the incentive award amount and each class member's individual recovery. The problem is that most class actions are for small amounts of money, on the one hand, while incentive awards are meant to compensate class representatives for their service to the class and for the risks that they encountered in providing that service, on the other. However, there is no obvious connection between the size of each class member's individual claims and the appropriate compensation for the named plaintiff's services. The Ninth Circuit noted in one case that "[t]here is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards."[17] The proposed incentive award was anywhere from 192 to 6 times greater than a class member's recovery. The former number surely serves the Ninth Circuit's point, but does the latter? Moreover, even when the proposed $5,000 incentive award is almost 200 times greater than a class member's recovery, if the class representatives have invested significant amounts of time and, for example, faced retaliation or other risks for their efforts, $5,000 does not seem that extravagant a payment.

It is completely understandable that courts would worry about this disparity and a positive development that they in fact do. But there is an aspect of the disparity that is built into the very nature of the endeavor: in class suits, the claims will almost invariably be small in nature, yet the class representatives most worthy of an award will typically be those who worked the hardest and suffered most.

§ 17:19 Incentive awards in securities class actions under the PSLRA

The Private Securities Litigation Reform Act of 1995 ("PSLRA") appears to prohibit incentive awards to class

---

and 0.003% of total payments to class members while $15,000 in the present case would have represented 0.052% of the total payments).

[17]Radcliffe v. Experian Information Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

representatives in securities class actions,[1] though the actual practices under the PSLRA are more nuanced.[2] With the PSLRA, Congress aimed to transfer control of securities class actions from small-stakes clients (who Congress believed to be controlled by class counsel) to large institutional investors (who Congress thought might better monitor and control class counsel). Imposing limitations on incentive awards was part of that effort, though many critics have noted that if Congress' aim was to encourage institutional involvement, its crackdown on incentive payments may have been counterproductive.[3]

The PSLRA appears to bar incentive awards in two interconnected sections. *First*, 15 U.S.C. § 78u-4(a)(2)(A) requires a plaintiff seeking to serve as a class representative to file a sworn certification with her complaint in which she avers to a series of items, including that she "will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's *pro rata* share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." *Second,* 15 U.S.C. § 78u-4(a)(4) states:

The share of any final judgment or of any settlement that is

[Section 17:19]

[1]*See* 15 U.S.C.A. § 78u-4(a)(2)(A)(vi), (4) (2010).

[2]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 2714176, *1 (S.D. Tex. 2008) ("There is a rigorous debate whether it is proper in class actions generally to approve an incentive award to named plaintiffs because these class representatives take risks and perform services that benefit the class." (citing **Newberg on Class Actions**)).

[3]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1347 (2006) ("A flat rule such as the PSLRA's ban on payments to class representatives not only is not clearly supported but may be counterproductive. The large-scale investors that Congress hoped to have serve as class representatives after the PSLRA may be the investors most sensitive to recovering their opportunity and other costs if they do serve. Therefore, to the extent these sought-after representatives are discouraged from serving by the anti-incentive-award rule, the rule may compete with the perhaps more important goal of securing sophisticated and large representative plaintiffs.").

See generally Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483 (2006).

awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

Most,[4] though not all,[5] courts have read these provisions as barring incentive awards.

The peculiar aspect of these provisions is that although they appear to bar incentive awards, they simultaneously

---

[4]In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328)(Apr. 17, 2014) ("Although the PSLRA specifically prohibits incentive awards or 'bonuses' to Lead Plaintiffs . . .").

Ray v. Lundstrom, Fed. Sec. L. Rep. (CCH) P 97083, 2012 WL 5458425, *3 (D. Neb. 2012) ("Although the PSLRA does not permit incentive awards . . .").

Robles v. Brake Masters Systems, Inc., 2011 WL 9717448, *17 (D.N.M. 2011) ("Congress has expressed hostility to incentive awards in the [PSLRA] which precludes incentive awards in securities-fraud litigation.").

In re TVIA Inc. Securities Litigation, 2008 WL 2693811, *2 (N.D. Cal. 2008) ("[T]his court has itself previously found that in light of the text of § 78u-4(a)(4), and the clear intention to eliminate financial incentives, bonuses and bounties for serving as lead plaintiff, incentive awards and compensatory awards falling outside the costs and expenses specified by the PSLRA are inconsistent with the express goals of § 78u-4(a) (4)." (citing In re ESS Technology, Inc. Securities Litigation, 2007 WL 3231729, *4 (N.D. Cal. 2007))).

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The district courts that have awarded incentive awards or requested amounts without requiring any explanation or detailing of the alleged costs in cases where PSLRA clearly applies, appear to be ignoring the clear language of PSLRA.").

Swack v. Credit Suisse First Boston, LLC, Fed. Sec. L. Rep. (CCH) P 94106, 2006 WL 2987053, *5 (D. Mass. 2006) ("I find that a representative plaintiff is only entitled under the PSLRA to an award of 'reasonable costs and expenses' over and above his or her pro rata share of the recovery, and not to a traditional 'compensation' or 'incentive' award. The representative plaintiff's significant stake in the outcome of the litigation is assumed to be sufficient incentive to remain involved in the litigation and to incur such expenses in the first place.").

[5]In re Heritage Bond Litigation, 2005 WL 1594403, *17 (C.D. Cal. 2005) (stating that "[i]t is within this Court's discretion to award incentive fees to named class representatives in a class action suit" and proceeding to do so).

permit named plaintiffs to be reimbursed for "reasonable costs and expenses (including lost wages) . . ."[6] Courts therefore regularly award representative plaintiffs monies under these sections,[7] and such awards are similar to service or incentive awards in regular class suits. Where the courts have split somewhat, however, is in how much documentation they require.[8] Some courts require little documentation and hence appear to treat the reimbursement provision as

---

[6]*See* 15 U.S.C.A. § 78u-4(a)(4).

[7]In re Schering-Plough Corp. Enhance Securities Litigation, 2013 WL 5505744, *37 (D.N.J. 2013), appeal dismissed, (3rd Circ. 13-4328)(Apr. 17, 2014) ("Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved.").

In re American Intern. Group, Inc. Securities Litigation, 2012 WL 345509, *6 (S.D.N.Y. 2012) ("Courts in this Circuit routinely award . . . costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (internal quotation marks omitted)).

In re Giant Interactive Group, Inc. Securities Litigation, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding incentive awards to four named plaintiffs and stating that "the Court finds that the lead plaintiffs devoted substantial effort and time to this case, including reviewing filings, producing documents, and travelling to be deposed, making these requests for awards reasonable").

In re Marsh & McLennan Companies, Inc. Securities Litigation, 2009 WL 5178546, *21 (S.D.N.Y. 2009) (awarding a combined $214,657 to two institutional lead plaintiffs).

In re American Business Financial Services Inc. Noteholders Ltigiation, Fed. Sec. L. Rep. (CCH) P 95015, 2008 WL 4974782, *19 (E.D. Pa. 2008) (awarding costs and expenses to lead plaintiffs).

Hicks v. Stanley, Fed. Sec. L. Rep. (CCH) P 93,579, 2005 WL 2757792, *10 (S.D.N.Y. 2005) ("Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place.").

In re WorldCom, Inc. ERISA Litigation, 33 Employee Benefits Cas. (BNA) 2291, 59 Fed. R. Serv. 3d 1170 (S.D.N.Y. 2004), order clarified, 2004 WL 2922083 (S.D.N.Y. 2004) (awarding $5,000 to each of the three named plaintiffs because they had "performed an important service to the class and the burden of this commitment deserves to be recognized through an award from the common fund").

[8]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 2714176, *2 (S.D. Tex. 2008) (noting the "split between courts which have read the [PSLRA] narrowly and strictly limited reimburse-

quite similar to a flat incentive award.[9] Other courts require

---

ment to actual costs and expenses incurred, many only when proven with detailed evidence, and other courts that have granted lead plaintiffs incentive awards to encourage high quality monitoring and not insisted that alleged costs and expenses to be detailed or even limited to 'costs and expenses directly relating to representation of the class" (footnote omitted) (internal quotation marks omitted)).

[9]In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 1000, Fed. Sec. L. Rep. (CCH) P 93239 (D. Minn. 2005) ("Lead plaintiffs here have fully discharged their PSLRA obligations and have been actively involved throughout the litigation. These individuals communicated with counsel throughout the litigation, reviewed counsels' submissions, indicated a willingness to appear at trial, and were kept informed of the settlement negotiations, all to effectuate the policies underlying the federal securities laws. The court, therefore, awards the $100,000 collectively to the lead plaintiff group to be distributed among the eight lead plaintiffs in a manner that plaintiffs' co-lead counsel shall determine in their discretion.").

Hicks v. Stanley, Fed. Sec. L. Rep. (CCH) P 93,579, 2005 WL 2757792, *10 (S.D.N.Y. 2005) ("Finally, the court approves the reimbursement of expenses to lead plaintiff Nicholson pursuant to plaintiff's motion. Nicholson spent considerable time discharging his responsibilities as lead plaintiff and class representative. The PSLRA permits lead plaintiffs to recover reasonable costs and expenses related to their representation of the class. Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." (citation omitted)).

Denney v. Jenkens & Gilchrist, 230 F.R.D. 317, 355, R.I.C.O. Bus. Disp. Guide (CCH) P 10837 (S.D.N.Y. 2005), aff'd in part, vacated in part, remanded, 443 F.3d 253, R.I.C.O. Bus. Disp. Guide (CCH) P 11050 (2d Cir. 2006) ("In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by the plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery.").

In re WorldCom, Inc. ERISA Litigation, 33 Employee Benefits Cas. (BNA) 2291, 59 Fed. R. Serv. 3d 1170 (S.D.N.Y. 2004), order clarified on other grounds, 2004 WL 2922083 (S.D.N.Y. 2004) (awarding the three named plaintiffs $5,000 each because "the three plaintiffs have been intimately involved in every step of the litigation. The named plaintiffs have performed an important service to the class and the burden of this commitment deserves to be recognized through an award from the common fund.").

In re Infospace, Inc., 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004) ("Lead Plaintiffs Amir Heshmatpour and Ronald Wyles on behalf of

clear proof of expenses[10] and hence read the provision more

---

Coastline Corporation Ltd. have requested reimbursement of their costs and expenses. A court may award 'reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative serving on behalf of the class.' Amir Heshmatpour requests $5,000, and Ronald Wyles requests $6,600. The Court finds these amounts to be reasonable." (quoting 15 U.S.C.A. § 78U-4(a)(4))).

[10]In re TVIA Inc. Securities Litigation, 2008 WL 2693811, *2 (N.D. Cal. 2008) (finding "no evidence in the conclusory statements provided in [lead plaintiff's] declaration that the compensation he seeks is reimbursement for costs, expenses or lost wages, reasonable or otherwise, as required by the text of § 78u-4(a)(4)" and thus declining to award the requested $15,000 compensation).

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The class representative failed to provide this court with any evidence of actual expenses incurred, lost wages, lost vacation time, or lost business opportunities. I conclude that the class representative has failed to demonstrate that he has incurred any 'reasonable costs and expenses' that can be awarded under PSLRA. Thus, the court will not award [named plaintiff] anything beyond his pro rata share of the settlement fund.").

In Re Ntl, Inc. Securities Litigation, 2007 WL 623808, *10 (S.D.N.Y. 2007) ("Lead Plaintiffs have signed certifications pursuant to the PSLRA, but their affidavits fail to explain how they determined their asserted hourly 'lost wages.' Without a better explanation for claims of $200–800 per hour of 'lost wages,' the Court should decline to award such amounts." (citation omitted)).

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2007 WL 313474, *25 (S.D.N.Y. 2007) ("Although [the lead plaintiff] claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead plaintiff. Under the PLSRA, it is simply not enough . . . to assert that she took time out of her workday and that her time is conservatively valued at $500 per hour. Accordingly, the Court declines to award reimbursement to [lead plaintiff].").

Swack v. Credit Suisse First Boston, LLC, Fed. Sec. L. Rep. (CCH) P 94106, 2006 WL 2987053, *5 (D. Mass. 2006) ("Since Congress specifically chose to limit recovery in PSLRA cases to reasonable costs and expenses (including lost wages) directly relating to the representation of the class, . . . I find that a representative plaintiff must provide the court with meaningful evidence demonstrating his or her actual costs and expenses (including lost wages) directly relating to the representation of the class . . ." (internal quotation marks omitted)).

Abrams v. Van Kampen Funds, Inc., Fed. Sec. L. Rep. (CCH) P 93,648, 2006 WL 163023, *4 (N.D. Ill. 2006) ("Lead plaintiffs do not contend that any portion of the requested amount represents any actual expenses that either has incurred. They do not claim that they missed any

narrowly. In particular, courts are more accepting of familiar nontaxable costs (such as documented travel expenses and fax, photocopy, and telephone charges)[11] but are more skeptical of lost wages or business opportunities, as the latter are often particularly difficult to document.[12]

---

work or other earning opportunity in order to participate in the litigation. Under the PSLRA, lead plaintiffs cannot be awarded additional compensation. The request for a compensatory award will be denied.").

In re KeySpan Corp. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 93534, 2005 WL 3093399, *21 (E.D.N.Y. 2005) ("Counsel fail to provide *any* basis for determining what reasonable costs and expenses were incurred [by lead plaintiffs]. Counsel have not shown how the time expended by the Class Representative and Lead Plaintiffs resulted in actual losses, whether in the form of diminishment in wages, lost sales commissions, missed business opportunities, use of leave or vacation time or actual expenses incurred. Without any proof or detail in this regard, I recommend that Class Representative and Lead Plaintiffs not be awarded any payment beyond their *pro rata* share of the settlement.").

In re AMF Bowling, 334 F. Supp. 2d 462, 470 (S.D.N.Y. 2004) (finding no congressional intent for undocumented reimbursements under the PSLRA and denying requested reimbursements to class representatives in part because of the lack of such documentation).

[11]For a discussion of what constitute nontaxable costs, *see* Rubenstein, 5 **Newberg on Class Actions** § 16:5 (5th ed.).

[12]In re Genta Securities Litigation, 70 Fed. R. Serv. 3d 931 (D.N.J. 2008) ("This Court accepts [lead plaintiff's] assertion that he incurred $5250 in costs from travel expenses, fax and photocopy expenses, and telephone charges. However, [lead plaintiff] has not submitted any evidence showing that he lost wages or business opportunities due to the time he spent working on the instant litigation. Although [lead plaintiff] estimated that he spent 222.36 hours performing duties related to this action, and established his discounted billing rate as $225 per hour, [he] has failed to show that his contributions to this action foreclosed him from obtaining business opportunities or earning wages.").

Smith v. Dominion Bridge Corp., Fed. Sec. L. Rep. (CCH) P 94205, 2007 WL 1101272, *12 (E.D. Pa. 2007) ("The class representative failed to provide this court with any evidence of actual expenses incurred, lost wages, lost vacation time, or lost business opportunities. I conclude that the class representative has failed to demonstrate that he has incurred any 'reasonable costs and expenses' that can be awarded under PSLRA. Thus, the court will not award [named plaintiff] anything beyond his pro rata share of the settlement fund.").

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2007 WL 313474, *25 (S.D.N.Y. 2007) ("Although [the lead plaintiff] claims to have spent time during her work day performing her duties as lead plaintiff, she nevertheless fails to claim any actual expenses incurred, or wages or business opportunities she lost, as a result of acting as lead

Thus, while Congress sought to limit incentive awards in class suits when it enacted the PSLRA, it did allow some payments to be made to class representatives, and courts have awarded such payments. Empirical data on incentive awards, described elsewhere in the Treatise,[13] nonetheless demonstrate that class representatives are least likely to get incentive awards in securities suits than in any other type of case. One study of cases resolved between 1993–2002 (which therefore straddles the enactment of the PSLRA) reported that courts granted incentive awards in 27.8% of all cases but 24.5% of securities cases.[14] A later study of cases resolved between 2006–2011 reported that courts granted incentive awards in 71.3% of all cases but in only 38.7% of securities cases.[15] To be clear, these data are not differentiating between cases in which counsel never applied for awards and those in which the court rejected an award, so the source of the lower award rate is unclear. Yet its existence is not.

The peculiarity about this state of affairs is that in enacting the PSLRA, Congress explicitly wanted class representatives to seize control of securities cases from class counsel. To accomplish that end, it sought to engage institutional investors in the endeavor by holding that the largest shareholder could be named the lead plaintiff in the case and authorized to hire lead counsel. Yet Congress provided very little incentive for those institutions to undertake that work and, in curtailing incentive awards, it destroyed one of the few incentives that did exist. Moreover, as Professor Nagareda argued some years ago, if the point of incentive awards is to reward *quality monitoring*, it seems particularly odd to limit awards in the very cases in which the goal is to

---

plaintiff. Under the PLRSA, it is simply not enough . . . to assert that she took time out of her workday and that her time is conservatively valued at $500 per hour. Accordingly, the Court declines to award reimbursement to [lead plaintiff].").

[13]*See* Rubenstein, 5 **Newberg on Class Actions** §§ 17:7 to 17:8 (5th ed.).

[14]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1323 tbl.2 (2006).

[15]William B. Rubenstein and Rajat Krishna, *Class Action Incentive Awards: A Comprehensive Empirical Study* (draft on file with author).

encourage quality monitors:[16]

> The PSLRA hinders the practical achievement of its own ideals for class representatives by confining incentive awards to restitution and rejecting complementary notions of reward. By limiting awards to "reasonable costs and expenses," the PSLRA seeks to fight the proverbial last war—to respond to perceived abuses in the pre-PSLRA era rather than to design a legal framework for awards under the changed arrangements for lead plaintiffs promoted by the PSLRA itself. When it comes to service as a PSLRA lead plaintiff, one substantial sticking point for many institutional investors appears to be precisely the prospect of merely gaining restitution for their efforts, without the possibility of reward beyond their pro rata share of any class-wide recovery. This result is ironic, to say the least, when the law consciously seeks to induce high-quality monitoring from persons who devote their professional lives to seeking big financial rewards, not just restitution for the costs and expenses of their efforts.[17]

In short, the PSLRA sends a mixed message: it aims to encourage large stake holders to intervene and seize control of such cases while insisting that they not be compensated in the normal manner for doing so.

§ 17:20 Incentive awards for objectors

As discussed in a prior section,[1] class members who provide a service to the class are eligible to apply for an incentive award from the court. Typically, it is the class representative or named plaintiff who is the applicant, as these

---

[16]Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483, 1491 (2006) ("The embrace of high-quality monitoring as a public policy goal and the experience with institutional investors in the post-PSLRA period, together, highlight the anomaly of awards confined to 'reasonable costs and expenses.' In this context, the law wants high-quality monitoring to occur but has encountered obstacles in achieving that goal. If anything, the logic behind installing institutional investors as lead plaintiffs supports a more—not less—wide-ranging inquiry for incentive awards in securities litigation.").

[17]Richard A. Nagareda, Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards, 53 UCLA L. Rev. 1483, 1491 (2006).

[Section 17:20]

[1]For a discussion of eligibility for incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:6 (5th ed.).

parties undertake special functions on behalf of absent class members, sometimes face unique risks in stepping forward to represent the class, and generally serve an important function in enabling a class action by their service to the class.[2] Class members who object to a proposed settlement or fee award and are in some way successful in reshaping the settlement similarly serve an important function in class action practice: because the class representative and class counsel are largely unmonitored agents of the class, those class members who take the time to scrutinize proposed settlements and provide their reactions to the court may assist the court in undertaking its oversight function and serve the class accordingly.[3] Counsel who represent objectors have therefore sought incentive awards on behalf of their objector clients.

Three issues are presented by such proposals: *first,* whether objectors are entitled to seek incentive awards; *second,* if they are, what are the circumstances in which courts should provide such awards; and *third,* if awards are provided, what amount is appropriate.

Eligibility. The answer to the first question seems clear: an objector is necessarily a class member and if that class member provides a service to the class, she stands in a similar position to the class representative entitled to an award and should therefore be similarly entitled. Many courts have so held either directly,[4] or indirectly by entertaining objector incentive award petitions, while few courts have held that objectors are never entitled to seek an award.[5] At least one

---

[2]For a discussion of these rationale that underlie incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:3 (5th ed.).

[3]In re Cardinal Health, Inc. Securities Litigation, 550 F. Supp. 2d 751, 753, Fed. Sec. L. Rep. (CCH) P 94714 (S.D. Ohio 2008) (noting that objectors can "add value to the class-action settlement process by: (1) transforming the fairness hearing into a truly adversarial proceeding; (2) supplying the Court with both precedent and argument to gauge the reasonableness of the settlement and lead counsel's fee request; and (3) preventing collusion between lead plaintiff and defendants").

[4]Hartless v. Clorox Co., 273 F.R.D. 630, 647 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) (recognizing that incentive awards for objectors are "sometimes available . . . if the objection confers a significant benefit to the class").

[5]Rose v. Bank of America Corp., 2015 WL 2379562, *3 (N.D. Cal.

court has entertained a request from a *pro se* objector.[6] Occasionally, class representatives who later become objectors receive incentive awards, but in granting those awards, the courts have not isolated their service as objectors as independently warranting an award.[7] At least one court has denied an objector incentive award in a PSLRA case on the grounds that incentive awards are barred by that statute.[8]

Standard of review. Courts generally will approve an

2015) ("Without a legal or factual argument, the Objectors plainly request an incentive award of $2,000 each 'for stepping out to protect and serve the class.' In the absence of legal authority that would allow for such an award to an objector, coupled with the complete lack of an explanation as to why such an award would be justified, this request is denied." (citation omitted)).

In re Celexa and Lexapro Marketing and Sales Practices Litigation, 2014 WL 4446464, *10 (D. Mass. 2014) (denying objector's request for a $10,000 incentive award because the objector "invoke[d] no authority for her request for an incentive award to a plaintiff who is not a class representative").

In re classmates.com Consol. Litigation, 2012 WL 3854501, *8–9 (W.D. Wash. 2012) (declining to award an incentive award because "[t]he court is aware of no authority authorizing a 'service award' to an objector" and noting that "[i]f there were such authority, the court assumes that it would treat a participation award to an objector similarly to a participation award to a class representative" but finding that the "objections did not contribute significantly to obtaining any benefit for the class").

[6]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 237-38 (10th Cir. 2009) (entertaining a request for an incentive award but rejecting objector's "invitation to apply to his pro se request for an incentive award the same standards applicable to an objector's request for an attorney fee" because the pro se objector's "position is not parallel to that of an objector seeking payment for his attorney fees").

[7]Martin v. Foster Wheeler Energy Corp., 2008 WL 906472, *9 (M.D. Pa. 2008) (granting incentive awards to two class representatives who later became objectors "for their work as Class Representatives from the inception of the litigation").

Lazy Oil Co. v. Wotco Corp., 95 F. Supp. 2d 290, 292 (W.D. Pa. 1997), aff'd, 166 F.3d 581, 1999-1 Trade Cas. (CCH) ¶ 72420, 42 Fed. R. Serv. 3d 669 (3d Cir. 1999) (granting incentive award to a class representative for his service to the class before he became an objector, but finding that his efforts opposing the settlement "have not enured to the benefit of class members").

[8]In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 2008 WL 4178151, *8 (S.D. Tex. 2008) (denying incentive award for services as class representatives and objectors because "such incentive awards are contrary to the policy behind the PSLRA").

award for an objector if she can prove that her objections "conferred a benefit on the class."[9] Thus, for example, an "objector whose arguments result in a reduction of attorney-fee and expense awards provides a benefit to the class."[10] However, courts—understandably skeptical of repeat objectors who recycle formulaic objections—tend to be dismissive of many objectors' contentions about their achievements.[11] As the Tenth Circuit has stated, "because the court is charged with protecting the interests of the class, general, garden-variety objections usually are not helpful to the court, nor do they benefit the class."[12] This position is consistent with the manner in which courts approach requests for fees from objectors' counsel.[13] Thus, absent evidence that objectors' work benefited the class or put them at risk, courts

---

For a discussion of the PSLRA's approach to incentive awards, *see* Rubenstein, 5 **Newberg on Class Actions** § 17:19 (5th ed.).

[9]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 233, 236 (10th Cir. 2009) (affirming the district court's denial of an incentive award to an objector "on the ground that his efforts did not benefit the class").

Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 398–99 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) ("In deciding whether an objector deserves an incentive award, courts have considered whether: (1) the objector's particular efforts conferred a benefit on the class; (2) the objector incurred personal risk; and/or (3) the objector was substantively involved in the litigation.").

[10]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 236 (10th Cir. 2009).

[11]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 236-37 (10th Cir. 2009) (affirming decision denying incentive award to pro se objector, noting that the lower court had concluded that the "objections did not confer a benefit on the class" because they were "general in nature, largely unsupported by specific citation to the record or to supporting caselaw, and lacking in meaningful analysis" and because "[the objector] had not identified any argument unique to his presentation" and "had not point[ed] to any argument of his that was both asserted in greater detail than other objectors and adopted in substance by the Special Master" (internal quotation marks omitted)).

[12]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 237 (10th Cir. 2009).

[13]*See, e.g.*, Rodriguez v. Disner, 688 F.3d 645, 658–59, 2012-2 Trade Cas. (CCH) ¶ 78006 (9th Cir. 2012) ("Nor is it error to deny fees to objectors whose work is duplicative, or who merely echo each others' arguments and confer no unique benefit to the class."). For a discussion of

deny awards.[14]

---

objectors' entitlement to fees, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:60 (5th ed.).

[14]McDonough v. Toys R Us, Inc., 2015-1 Trade Cas. (CCH) ¶ 79040, 2015 WL 263562, *30 (E.D. Pa. 2015) (granting one objector an incentive award of $1,000 because "[a]lthough [the objector] did not participate in discovery, nor was he deposed, his objection provided a significant benefit to the class" but denying incentive awards to two other objectors because "they have not demonstrated that their objections provided a benefit to the class").

Gascho v. Global Fitness Holdings, LLC, 2014 WL 3543819, *6 (S.D. Ohio 2014) (denying attorney's fees and incentive awards to objectors because they "have not provided any benefit to the Class").

Fraley v. Facebook, Inc., 2014 WL 806072, *1–2 (N.D. Cal. 2014) (denying both attorney's fees and incentive award to objector because his objections did not "contribute materially to the proceeding").

In re classmates.com Consol. Litigation, 2012 WL 3854501, *8–9 (W.D. Wash. 2012) (denying an incentive award because "[t]he court is aware of no authority authorizing a 'service award' to an objector" and noting that "[i]f there were such authority, the court assumes that it would treat a participation award to an objector similarly to a participation award to a class representative" but finding that the "objections did not contribute significantly to obtaining any benefit for the class").

Hartless v. Clorox Co., 273 F.R.D. 630, 647 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) (denying objector's request for incentive award because, *inter alia*, her objections "did not confer a benefit on the class or add anything to this decision").

Parker v. Time Warner Entertainment Co., L.P., 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009) (denying incentive awards to objectors because "[t]here is no indication that the [objectors] themselves were put at risk or inconvenienced in any meaningful way by lending their names to the objections pursued by their counsel").

Perez v. Asurion Corp., 2007 WL 2591174, *1 (S.D. Fla. 2007) (denying incentive award to objector because there was no evidence that the objector "spent a considerable amount of time assisting with the prosecution of this case").

In re Educational Testing Service Praxis Principles of Learning and Teaching, Grades 7–12 Litigation, 447 F. Supp. 2d 612, 634, 213 Ed. Law Rep. 493 (E.D. La. 2006) (denying incentive awards to objectors because only one of the seven objections offered was meritorious, the court would have recognized that the attorney's fee award was too high even absent that objection, and the "objectors' other objections added nothing to the litigation and, if anything, only prolonged it").

In re Excess Value Ins. Coverage Litigation, 598 F. Supp. 2d 380, 393 (S.D.N.Y. 2005) (denying objectors' request for incentive rewards because "the Class received relatively little Settlement Value and Objectors' efforts have not been shown appreciably to have benefitted the Class" and "the Court needed little or no assistance from the Objectors").

Amount. Objector incentive awards are modest. Class representatives tend to serve the class for years, undertake a series of tasks in that function, and face specific risks. Empirical evidence shows that incentive awards for those class representatives average between $10,000–$15,000 per class representative.[15] By contrast, objectors tend to do little more than file a single pleading at the conclusion of the case, possibly appear at the fairness hearing, and plausibly pursue an appeal if the objection is denied.[16] Their service is far more limited than that of the class representative and—despite arguments to the contrary[17]—it is unlikely they would face significant risks by making an objection. Courts

[15]Theodore Eisenberg and Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1307–08 (2006) (reporting that incentive awards are granted in 28% of class suits and that the average award per class representative is about $16,000, with the median award per class representative being closer to $4,000).

[16]Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 813 (N.D. Ohio 2010), on reconsideration in part, (July 21, 2010) ("The Court held that the named class representatives in this case were entitled to a $5,000 incentive award because each submitted an affidavit describing his extensive involvement in the litigation and assistance to Class Counsel. In contrast, there is no evidence that [the objector] devoted substantial time or effort to this case. He correctly notes that he 'voluntarily involved himself in a case impacting over 400,000 class members,' but does not describe any further involvement with this litigation. Based on that nominal contribution, he is entitled to the nominal sum of $500.00 as an incentive award." (citation omitted)).

[17]Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 399 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) (reporting objectors' argument that "in challenging the approval of the settlement, they incurred a substantial personal risk by: (1) exposing themselves to the risk of harassing discovery and private investigation from the plaintiffs' attorneys, and (2) posting an appeal bond of $25,000" (citation omitted) (internal quotation marks omitted)).

Park v. Thomson Corp., 633 F. Supp. 2d 8, 14, 2009-2 Trade Cas. (CCH) ¶ 76775 (S.D.N.Y. 2009) (reporting objectors' argument that they were entitled to an award "because they faced the risk of a Rule 11 sanctions motion threatened by Plaintiffs' counsel" but rejecting this argument because "Rule 11 sanctions are a risk borne by all litigants").

In re Apple Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 96312, 2011 WL 1877988, *4 (N.D. Cal. 2011) (reporting objector's argument that he had "exposed himself to the risk of harassing discovery and quite likely faced private investigation from the plaintiffs' attorneys").

have therefore awarded small sums to successful objectors —$500 in two cases,[18] $1,000 in two others,[19] $1,500 in one[20]—noting that "[t]he amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit."[21]

In sum, while objectors are entitled to seek incentive awards, courts are quite wary of providing such awards and do so only in the rare circumstance where the objector's work substantially served the class's interest, and even then only in nominal sums.

---

[18]Dewey v. Volkswagen of America, 909 F. Supp. 2d 373, 400 (D.N.J. 2012), aff'd, 558 Fed. Appx. 191 (3d Cir. 2014), cert. denied, 135 S. Ct. 231, 190 L. Ed. 2d 135 (2014) (awarding objectors $500 incentive payments because of "the[ir] willingness to serve as objectors so that their counsel could pursue a legal challenge that ultimately provided a certain benefit to like car owners and lessees warrants some incentive award").

Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 813 (N.D. Ohio 2010), on reconsideration in part, (July 21, 2010) (awarding objector a "nominal sum" of $500 for his "nominal contribution" to the case).

[19]McDonough v. Toys R Us, Inc., 2015-1 Trade Cas. (CCH) ¶ 79040, 2015 WL 263562, *30 (E.D. Pa. 2015) (granting one objector an incentive award of $1,000 because "[a]lthough [the objector] did not participate in discovery, nor was he deposed, his objection provided a significant benefit to the class" but denying incentive awards to two other objectors because "they have not demonstrated that their objections provided a benefit to the class").

In re Apple Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 96312, 2011 WL 1877988, *5 (N.D. Cal. 2011) (finding that an incentive payment of $1,000 would "fairly . . . compensate [the objector] for [his] contributions to this litigation").

[20]Sobel v. Hertz Corp., 53 F. Supp. 3d 1319, 1334 n.13 (D. Nev. 2014) (finding that the objectors' work "did contribute to the value of the resulting settlement" as even opponents noted that "the Court did reference the Objectors arguments and briefing in deciding to reject the failed settlement").

[21]Park v. Thomson Corp., 633 F. Supp. 2d 8, 14, 2009-2 Trade Cas. (CCH) ¶ 76775 (S.D.N.Y. 2009) (quoting Fears v. Wilhelmina Model Agency, Inc., 2005-1 Trade Cas. (CCH) ¶ 74783, 2005 WL 1041134, *3 (S.D.N.Y. 2005), aff'd in part, vacated in part, remanded, 473 F.3d 423, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007)).

§ 17:21 Appellate review of incentive awards

Appellate courts review a district court's award or denial of an incentive award under an abuse of discretion standard.[1] In adopting this standard (in a case involving a *pro se* objector's right to an incentive award), the Tenth Circuit gave three reasons justifying its use: *first*, that the Circuit reviews attorney fee awards in class actions using an abuse of discretion standard;[2] *second*, that "the district court's familiarity with the parties and the proceedings supports an

[Section 17:21]

[1]**Second Circuit**

Lobur v. Parker, 378 Fed. Appx. 63, 65 (2d Cir. 2010) ("We review a district court's grant or denial of incentive awards for the abuse of discretion.").

Silverberg v. People's Bank, 23 Fed. Appx. 46, 48 (2d Cir. 2001) ("The abuse-of-discretion standard of review also applies to the grant or denial of incentive awards for class representatives.").

Sixth Circuit

Hadix v. Johnson, 322 F.3d 895, 897, 55 Fed. R. Serv. 3d 116, 2003 FED App. 0072P (6th Cir. 2003) ("Although this circuit has never addressed the issue, we agree with the circuit courts that have concluded that a district court's denial of an incentive award should be reviewed for an abuse of discretion.").

Seventh Circuit

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir. 2000) ("Class counsel challenges several aspects of the district court's decisions regarding attorneys' fees, costs, and the requested incentive award for the lead plaintiff. . . . We review the district court's decisions respecting these matters for abuse of discretion, except where counsel challenges the methodology employed by the district court, in which case our review becomes plenary.").

Ninth Circuit

In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 463, Fed. Sec. L. Rep. (CCH) P 90977, 46 Fed. R. Serv. 3d 883 (9th Cir. 2000), as amended, (June 19, 2000) ("[T]he district court did not abuse its discretion in awarding attorney's fees to Class Counsel and in awarding an incentive award to the Class Representatives.").

Tenth Circuit

UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 234-35 (10th Cir. 2009) (applying and explaining the circuit's adoption of an abuse of discretion standard).

[2]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009).

abuse-of-discretion standard";[3] and *third*, because incentive awards arise in common fund cases and such cases are equitable in nature, appellate courts "review the district court's exercise of its equitable powers for abuse of discretion."[4]

A district court abuses its discretion when it has "based its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling."[5] Appellate courts that utilize the abuse of discretion standard uphold trial court findings of fact unless they are clearly erroneous, while they review the trial court's legal analysis *de novo*.[6]

---

[3]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009); *see also* Case v. Unified School Dist. No. 233, Johnson County, Kan., 157 F.3d 1243, 1249, 129 Ed. Law Rep. 1003 (10th Cir. 1998) ("We customarily defer to the District Court's judgment [regarding an attorney's fee award] because an appellate court is not well suited to assess the course of litigation and the quality of counsel." (internal quotation marks omitted)).

[4]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (internal quotation marks omitted)).

[5]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009) (internal quotation marks omitted)).

[6]UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Min. Corp., 352 Fed. Appx. 232, 235 (10th Cir. 2009).

EXHIBIT B

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee,
JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF PROFESSOR WILLIAM B. RUBENSTEIN FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING *EN BANC*

Martin N. Buchanan
LAW OFFICE OF MARTIN N. BUCHANAN, APC
665 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus* provides the following Certificate of Interested Persons and Corporate Disclosure Statement.

- Buchanan, Martin N. – Counsel for *Amicus Curiae*
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
- Dickenson, Jenna – Appellant
- Ehren, Michael L. – Counsel for Defendant-Appellee
- Goldberg, Martin B. – Counsel for Defendant-Appellee
- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
- Greenwald, Michael L. – Counsel for Plaintiff-Appellee
- Heinz, Noah S. – Counsel for Plaintiff-Appellee
- Hopkins, Honorable James M. – Magistrate Judge
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
- Issacharoff, Samuel – Counsel for Plaintiff-Appellee
- Johnson, Charles T. – Plaintiff-Appellee

- Johnson, Jesse S. – Counsel for Plaintiff-Appellee
- Keller, Ashley C. – Counsel for Plaintiff-Appellee
- Keller Lenkner LLC – Counsel for Plaintiff-Appellee
- Lash, Alan David – Counsel for Defendant-Appellee
- Lash & Goldberg LLP – Counsel for Defendant-Appellee
- Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
- Lenkner, Travis D. – Counsel for Plaintiff-Appellee
- Monaghan, Maura K. – Counsel for Defendant-Appellee
- NPAS Solutions, LLC – Defendant-Appellee
- Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29(b)(3) and Eleventh Circuit Rule 29-3, Professor William B. Rubenstein respectfully requests leave to file the accompanying *amicus curiae* brief in support of rehearing *en banc* in this matter. In support of this request and in demonstration of good cause, *amicus* states as follows:

1. *Amicus* is the Bruce Bromley Professor of Law at Harvard Law School and (since 2008) the sole author of *Newberg on Class Actions*, the leading treatise on class action law in the United States.

2. Professor Rubenstein respectfully submits this brief for three independent reasons. *First*, Professor Rubenstein believes the Panel decision to be of exceptional importance because the vast majority of class action settlements involve incentive awards and they have been approved in every other Circuit in the country. *Second,* the Panel's critical decision cites to and relies on the *Newberg* treatise. The Panel's discussion of Professor Rubenstein's work could be read to suggest that he opposes the practice of incentive awards. Professor Rubenstein seeks to ensure that the record accurately reflects his position on incentive awards. *Third*, *amicus* addresses issues not covered in the briefing to

date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c) the effect of recent changes to Rule 23 on judicial review of incentive awards.

CONCLUSION

For these reasons, *amicus* respectfully requests leave to file his *amicus curiae* brief in support of rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
LAW OFFICE OF MARTIN N. BUCHANAN, APC
665 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this motion was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. P. 27(d)(1), 32(g)(1); 11th Cir. R. 29-1. This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 261 words, excluding the parts exempted under Rule 32(f).

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this motion was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
Martin N. Buchanan

No. 18-12344

In the United States Court of Appeals for the Eleventh Circuit

CHARLES T. JOHNSON,
on behalf of himself and others similarly situated,
Plaintiff–Appellee,
JENNA DICKENSON,
Interested Party–Appellant,

v.

NPAS SOLUTIONS, LLC,
Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF PROFESSOR WILLIAM B. RUBENSTEIN AS *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

Martin N. Buchanan
LAW OFFICE OF MARTIN N. BUCHANAN, APC
665 W. Broadway, Suite 1700
San Diego, CA 92101
(619) 238-2426
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus* provides the following Certificate of Interested Persons and Corporate Disclosure Statement.

- Buchanan, Martin N. – Counsel for *Amicus Curiae*
- Davidson, James L. – Counsel for Plaintiff-Appellee
- Davis, John W. – Counsel for Appellant Jenna Dickenson
- Debevoise & Plimpton LLP – Counsel for Defendant-Appellee
- Dickenson, Jenna – Appellant
- Ehren, Michael L. – Counsel for Defendant-Appellee
- Goldberg, Martin B. – Counsel for Defendant-Appellee
- Greenwald Davidson Radbil PLLC – Counsel for Plaintiff-Appellee
- Greenwald, Michael L. – Counsel for Plaintiff-Appellee
- Heinz, Noah S. – Counsel for Plaintiff-Appellee
- Hopkins, Honorable James M. – Magistrate Judge
- Isaacson, Eric Alan – Counsel for Appellant Jenna Dickenson
- Issacharoff, Samuel – Counsel for Plaintiff-Appellee
- Johnson, Charles T. – Plaintiff-Appellee

- Johnson, Jesse S. – Counsel for Plaintiff-Appellee
- Keller, Ashley C. – Counsel for Plaintiff-Appellee
- Keller Lenkner LLC – Counsel for Plaintiff-Appellee
- Lash, Alan David – Counsel for Defendant-Appellee
- Lash & Goldberg LLP – Counsel for Defendant-Appellee
- Law Office of John W. Davis – Counsel for Appellant Jenna Dickenson
- Lenkner, Travis D. – Counsel for Plaintiff-Appellee
- Monaghan, Maura K. – Counsel for Defendant-Appellee
- NPAS Solutions, LLC – Defendant-Appellee
- Nutley, C. Benjamin – Counsel for Appellant Jenna Dickenson
- Postman, Warren D. – Counsel for Plaintiff-Appellee
- Radbil, Aaron D. – Counsel for Plaintiff-Appellee
- Rosenberg, Honorable Robin L. – District Court Judge
- Rubenstein, William B. – *Amicus Curiae*
- Stahl, Jacob W. – Counsel for Defendant-Appellee
- Van Wey, Lorelei Jane – Counsel for Defendant-Appellee

1. NPAS Solutions, LLC is wholly owned by National Patient Accounts Services, Inc., which is wholly owned by Parallon Business Solutions, LLC. The ultimate parent of Parallon Business Solutions, LLC is HCA Healthcare, Inc., a publicly traded company.

2. No publicly held corporation owns 10% or more of NPAS Solutions' stock.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

RULE 35-5(C) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether the common practice of awarding incentive payments to named plaintiffs to compensate them for their efforts protecting absent class members' interests is *per se* unlawful.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*
Martin N. Buchanan
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Rules

Legislative Materials

Secondary Authorities

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae Professor William Rubenstein is the Bruce Bromley Professor of Law at Harvard Law School and the author of *Newberg on Class Actions*, the leading American class action law treatise. In 2015, Professor Rubenstein wrote treatise Chapter 17, a 98-page treatment of incentive awards. This review encompassed a range of issues including new empirical evidence about incentive awards.

Amicus respectfully submits this brief for three reasons. *First*, *amicus* believes the Panel's categorical rejection of incentive awards to be of exceptional importance because most class actions involve such awards and because they have been approved in every other Circuit. *Second,* as the Panel's decision relies on the *Newberg* treatise, *amicus* seeks to ensure that the record accurately reflects his position. *Third*, *amicus* addresses issues not covered in the briefing to date by examining (a) the facts underlying *Greenough*; (b) the relevance of Congress's approach to incentive awards in the securities field; and (c)

[*] This brief was not authored in whole or in part by counsel for any party. No party, party's counsel, or person—other than *amicus curiae* or his counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

the effect of recent changes to Rule 23 on judicial review of incentive awards.

Under Federal Rule of Appellate Procedure 29(b)(2), *amicus* may file this brief only by leave of court. By the accompanying motion, *amicus* has so moved.

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

Plaintiff-Appellee Johnson's petition demonstrates that the Panel's decision is of exceptional importance warranting *en banc* review because it misapplies applicable Supreme Court and Eleventh Circuit precedent, conflicts with the holding of every other Circuit on this question, and, in categorically barring incentive awards, affects every class action in this Circuit.

This brief adds three points: the Panel's decision (1) fails on its own terms (as a matter of equity) because it never compared the ***facts*** in *Greenough* to those in this case or in class actions generally; (2) fails to account for Congress's approach to incentive awards in the Private Securities Litigation Reform Act of 1995, an approach which undermines its holding; and (3) fails to acknowledge 2018 congressionally approved changes to Rule 23 that explicitly require a

court reviewing a proposed settlement to ensure "the proposal treats class members *equitably* relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). That amendment squarely places review of incentive awards within Rule 23's settlement approval provision going forward and hence renders the Panel's decision—even if permitted to stand—irrelevant to current class action practice. The Panel stated that "if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute," *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020), but it appeared unaware of the actions of Congress and the Rules Committee directly on point.

ARGUMENT

The Panel's prohibition on incentive awards is an issue of exceptional importance, but its decision failed to consider the applicable facts and relevant aspects of federal law and Rule 23.

I. The Panel's decision fails as a matter of equity.

The Panel found *Greenough* controlling without a full review of the case's facts. Those show that Vose, the active litigant, sought attorney's fees and expenses amounting to $53,938.30 and an additional $49,628.35 for himself. *See Trustees v. Greenough*, 105 U.S. 527, 530

(1881). Specifically, Vose sought payment of "an allowance of $2,500 a year for ten years of personal services," *id.,* plus $9,625 in interest, as well as another $15,003.35 for "railroad fares and hotel bills." *Id.*

Those numbers are staggering: inflation calculators suggest that $1 in 1881 is worth $26.49 in 2019 dollars.[1] Thus, Vose sought a "salary" of $66,225 per year for 10 years,[2] plus interest—or a total of $917,216—as well as $397,439 for hotel bills and travel expenses. This amounts to roughly $1.31 million current dollars. It was also equivalent to (92% of) his attorney's fees and expenses.

Is it any wonder that equity balked?

Here the named plaintiff seeks $6,000 in total (0.46% of what Vose sought), none of it a yearly salary of any kind, and all of it amounting to about 1.3% of what the attorneys seek. Any true ***equitable*** analysis

---

[1] *See Consumer Price Index, 1800-*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-.

[2] This $66,225 number is perfectly confirmed by the fact that Vose's $2,500 annual salary constituted 25% of the 1881 Supreme Court justice salary of $10,000, while 25% of a current justice's salary ($265,000) is $66,400. *See Judicial Salaries: Supreme Court Justices,* Federal Judicial Center (last visited Oct. 26, 2020), https://www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices.

would find *Greenough* inapposite on the numbers alone. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167 (1939) ("As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.").

Even if the Panel's decision is read as one of type not degree—limiting "salaries" and "personal expenses" regardless of their level—this factual review nonetheless undermines its logic. Vose truly sought a salary—a fixed regular payment, *see Salary*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/salary (last visited Oct. 27, 2020)—while this incentive award ($6,000) and the typical incentive awards are never a fixed regular payment and they hardly amount to a salary. Professor Rubenstein's empirical analysis shows the average incentive award to be $11,697 in 2011 dollars (or $13,299 in 2019 dollars).[3] *See* 5 William B. Rubenstein, *Newberg on Class Actions* § 17:8 (5th ed., June 2020 update) [hereinafter *Newberg on Class Actions*]. These facts undermine the Panel's declaration that,

[3] *See Inflation Calculator*, Federal Reserve Bank of Minneapolis (last visited Oct. 25, 2020), https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator.

"It seems to us that the modern-day incentive award for a class representative is ***roughly*** analogous to a salary." *Johnson*, 975 F.3d at 1257 (emphasis added). Far too much rides on the word "roughly" for that analogy to land.

Nor is *Greenough's* objection to the category of Vose's request labelled "personal expenses" particularly apposite—again, those payments were for $397,439 in hotel bills and travel expenses, amounts the Court might rightly have found extravagant and hence "personal." The modest level of the typical modern incentive award belies any sense that the representative is dining out at the class's expense.

These facts render *Greenough's* concern—that it "would present too great a temptation to parties to intermeddle in the management of valuable . . . funds . . . if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid," *Greenough*, 105 U.S. at 1157—inapplicable to the modern incentive award and render nonsensical the Panel's conclusion "that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," *Johnson*, 975 F.3d at 1258.

* * *

These objector's counsel proffered this same *Greenough* argument to the Second Circuit, but that Court rejected it on the grounds that *Greenough's* facts were inapposite. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir.), *cert. denied sub nom. Bowes v. Melito*, 140 S. Ct. 677 (2019). The Panel declared itself "unpersuaded by the Second Circuit's position," *Johnson*, 975 F.3d at 1258 n.8, but this review has demonstrated that the Second Circuit got it right and the Panel's conflicting conclusion should be reviewed (and reversed) *en banc*.

II. The Panel's decision fails to account for Congress's approach to incentive awards in an analogous setting.

Far closer in context and time than *Greenough*, is Congress's 1995 approach to incentive awards in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 78u-4 et seq.

With the PSLRA, Congress aimed to transfer control of securities class actions from small-stakes clients to large institutional investors. Limiting excess payments to named plaintiffs was a critical part of that effort. The PSLRA contains several provisions on point. *First*, the PSLRA requires a putative lead plaintiff to aver that it "will not accept any payment for serving as a representative party on behalf of a class

beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)." 15 U.S.C. § 78u-4(a)(2)(A)(vi). *Second*, the Act states that the representative's fund allocation "shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class." 15 U.S.C. § 78u-4(a)(4). *Third*, the Act explicitly does ***not*** "limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." *Id.; see also* S. Rep. No. 104-98, at 10 (1995) (explaining that "service as the lead plaintiff may require court appearances or other duties involving time away from work").

These provisions demonstrate three pertinent points:

1. Congress sees incentive awards as a question of fair settlement allocation, not attorney's fees.
2. Congress is aware of incentive awards, knows how to limit them when it wants to do so, and has limited them only in securities cases.
3. Even while limiting incentive awards, Congress acknowledges and permits repayment for lead plaintiffs' efforts.

These points undermine the Panel's decision. The majority declined to analyze the incentive award in terms of intra-class equity, as the dissent would have; failed to appreciate that Congress has limited incentive awards only in securities cases; and failed to acknowledge Congress's approval of repayment of expenses, even when otherwise limiting incentive payments.

The PSLRA post-dates *Greenough* by 114 years, and, as a law about modern class action practice, is far closer in context than the trust law at issue in *Greenough*. The Panel should have considered its relevance before holding that *Greenough* categorically bars incentive awards in today's class action.

III. The Panel's decision fails to account for relevant 2018 amendments to Rule 23.

Quoting Professor Rubenstein's treatise, the Panel held that Rule 23 has nothing to say about incentive awards:

> [The] argument [in support of the incentive award] implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't: "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." The fact that Rule 23 post-dates *Greenough* and *Pettus*, therefore, is irrelevant.

Johnson, 975 F.3d at 1259 (quoting *Newberg on Class Actions* § 17:4) (footnote omitted).

Professor Rubenstein wrote that sentence in 2015. Congress subsequently approved amendments to Rule 23 that render the sentence out of date.[4]

Prior to December 1, 2018, Rule 23(e) directed a court reviewing a settlement agreement to ensure that the agreement was "fair, reasonable, and adequate." That was the entire standard, although each Circuit developed factors pertinent to that review. Congress approved amendments to Rule 23(e) in late 2018 that codified elements of the Circuit tests. *See* Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

One of the new Rule 23 prongs requires a Court reviewing a settlement to ensure that the proposal "treats class members *equitably*

[4] Regardless, the fact that Rule 23 did not mention incentive awards explicitly hardly dictates the Panel's conclusion that the Rule was therefore "irrelevant" in making an equitable evaluation of incentive awards. *See infra* Section III.

relative to each other." Fed. R. Civ. P. 23(e)(2)(D) (emphasis added). The Advisory Committee noted that this prong "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others." Fed. R. Civ. P. 23(e)(2), advisory committee's note to 2018 amendment.

New Rule 23(e)(2)(D) should now govern review of incentive awards. An incentive award constitutes an extra allocation of the settlement fund to the class representative and a court asked to approve a settlement agreement encompassing such an allocation would need to ensure that it nonetheless "treats class members *equitably* relative to each other."

The facts of this case are exemplary. The parties' settlement established a fund (Doc. 37-1 at Pg. 17 ¶5.1), stated how the fund would be allocated (¶5.2), and noted that the "class plaintiff" would seek "an incentive payment (in addition to any pro rata distribution he may receive [from the fund])." (¶6.2). Counsel then sought settlement approval, including of the incentive award, under Rule 23(e) (Docs. 38, 43).

The objector challenged the incentive award, alleging that it exceeded the amounts recovered by the other class members (Doc. 42 at Pg. 15), then argued to the Panel that the incentive award was a "settlement allocation[] that treat[s] the named plaintiffs better than absent class members," App. Br. at 52, and that "the [d]isparity in this case between [the representative's] $6,000 bonus and the relief obtained for the rest of the class . . . casts doubt on . . . the adequacy of the Settlement," *id.* at 53; *see also id.* at 57 (characterizing award as a "disproportionate payment").

Thus, although counsel lodged the request for judicial approval of the incentive award with their fee petition (Doc. 44 at Pgs. 15–16), they were not seeking a fee award governed by Rule 23(h). They were seeking judicial approval of their settlement agreement allocating extra money to the representative—and Rule 23(e)'s settlement approval provisions govern review of that request.

When an incentive award is properly scrutinized as a question of intra-class equity, its fairness comes into focus. Class representatives and absent class members are differently situated with regard to the litigation, as their titles suggest. A court can—indeed should—take

account of that fact in reviewing a proposed settlement. As Professor Rubenstein explains in the *Newberg* treatise:

> Incentive awards surely make it look as if the class representatives are being treated differently than other class members, but . . . [they] are not similarly situated to other class members. They have typically done something the absent class members have not—stepped forward and worked on behalf of the class—and thus to award them only the same recovery as the other class members risks disadvantaging the class representatives by treating these dissimilarly-situated individuals as if they were similarly-situated . . . . In other words, incentive awards may be necessary to ensure that class representatives are treated equally to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.

5 *Newberg on Class Actions* § 17:3.

That is not to say that all incentive awards are equitable—an excessive award, such as that sought in *Greenough*, would surely be inequitable. *See id.* at § 17:18. But it is to say that Congress has now given judges the explicit authority to scrutinize the equity of incentive awards through the lens of Rule 23(e).

Thus, even if the Court were inclined to leave in place the Panel's reasoning as to this pre-2018 settlement, the full Circuit should clarify the inapplicability of the holding to judicial review of settlements after December 1, 2018.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing *en banc*.

Dated: October 29, 2020

Respectfully submitted,

/s/ *Martin N. Buchanan*

Martin N. Buchanan
LAW OFFICE OF MARTIN N. BUCHANAN, APC
665 W. Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 238-2426
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. *See* Fed. R. App. 29(a)(4), 32(g)(1). This brief complies with the type-volume limitation of Eleventh Circuit Rule 29-3 because it contains 2,594 words, excluding the parts exempted under Rule 32(f). *See* Fed. R. App. 29(b)(4).

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, a true and correct copy of this brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Martin N. Buchanan*
Martin N. Buchanan

CERTIFICATE OF SUBMISSION AND SERVICE
AND REQUEST FOR INCLUSION ON THE PUBLIC RECORD

I hereby certify that, on October 11, 2023, I am submitting and serving the foregoing WRITTEN STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL- APPROVAL HEARING *IN NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA* by emailing it to the following email addresses provided for objectors' submissions in the official long-form Class-Action Settlement Notice in this matter:

DCDPACERFeesSettlement@dcd.uscourts.gov
The Honorable Paul L. Friedman
United States District Court for the District of Columbia 333 Constitution Avenue, NW,
Washington, DC 20001

deepak@guptawessler.com
Gupta Wessler PLLC
2001 K Street, NW, Suite 850 North Washington, DC 20006

brenda.gonzalez.horowitz@usdoj.gov
Brenda Gonzáles Horowitz
Assistant United States Attorney Patrick Henry Building
601 D Street, N.W.
Washington, DC 20530

I further respectfully request that both the forgoing duly served and submitted WRITTEN STATEMENT OF ERIC ALAN ISAACSON OF INTENT TO APPEAR IN PERSON AT THE OCTOBER 12, 2023, FINAL- APPROVAL HEARING *IN NATIONAL VETERANS LEGAL SERVICES PROGRAM, ET AL. V. UNITED STATES OF AMERICA* and my previously served and submitted September 12, 2023, OBJECTION OF ERIC ALAN ISAACSON) TO PROPOSED SETTLEMENT IN *NATIONAL VETERANS LEGAL SERVICES) PROGRAM, ET*

AL. V. UNITED STATES OF) AMERICA, be included in the publicly available PACER-accessible district-court docket in the foregoing matter.

/s/ Eric Alan Isaacson
Eric Alan Isaacson
(pro se)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.	Case No. 1:16-cv-00745-PLF

NOTICE OF SUBMISSION OF PAYMENT NOTIFICATION FORMS

At yesterday's hearing, the Court asked class counsel to file four forms used by the class administrator: (1) the form used to allow PACER accountholders to notify the administrator that an entity paid PACER fees on their behalf, (2) the form used to allow payers to notify the administrator that they paid PACER fees on an accountholder's behalf, (3) the notification sent to accountholders informing them that an individual or entity claimed to pay PACER fees on their behalf; and (4) the form used to allow PACER accountholders to dispute the payment notification.

These forms are attached as exhibits. By way of background, this Court's preliminary-approval order, issued in May 2023, required the plaintiffs to modify the PACER Fees Class Action website to "allow accountholders to notify the Administrator that an entity paid PACER fees on their behalf, and. . . allow payers to notify the Administrator that they paid PACER fees on an accountholder's behalf." ECF 153 at 5. Individuals or entities were required to submit these Payment Notification Forms within sixty days of the dissemination of email notice. That deadline was subsequently extended to October 5, 2023.

Exhibit 1 is the form template used by PACER accountholders to notify the class administrator that someone paid fees on their behalf. For example, if an individual attorney is listed as the accountholder on a PACER account but the PACER fees were in fact paid by a law firm, the attorney could notify the administrator that the law firm paid the fees associated with the account. To date, the administrator has received 464 accountholder notifications.

Exhibit 2 is the form template used by payers to notify the administrator that they paid PACER fees on behalf of accountholders. For example, if a law firm paid the PACER fees for each of its attorney accountholders, it could notify the administrator that it did so. This form requires the payers to include the time period for which they paid the fees (to account, for example, for accountholders who may have changed jobs but kept the same PACER number). To date, the administrator has received 409 payer notifications.

Exhibit 3 is the email used to notify the accountholder that a payer submitted a notification informing the administrator that it paid fees on behalf of the accountholder and providing the accountholder an opportunity to dispute the notification.

Exhibit 4 is the form template used by PACER accountholders to dispute the payment notification. To date, the administrator has not received any such disputes.

Dated: October 13, 2023

Respectfully Submitted,

/s/ William H. Narwold
William H. Narwold
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
bnarwold@motleyrice.com

Meghan S.B. Oliver
Charlotte E. Loper

MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000
moliver@motleyrice.com
cloper@motleyrice.com

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
jon@guptawessler.com

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2023, I electronically filed this notice through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold
William H. Narwold

EXHIBIT 1

Case No. 1:16-cv-00745-PLF

KCC

Home | Class Notice | Court Documents | Frequently Asked Questions | Payment Notification/Dispute | Address Update

PACER National Veterans Legal Services Program, et al. v. United States II

Payment Notification Form

Account Holder Information

First Name

Last Name

*Firm Name

*Primary Address

Primary Address Continued

*City

*State — Select

*Zip

*Country — UNITED STATES

*Telephone Number

*Email

*Pacer Account Number

☐ If you have an Old Pacer Account Number that is in the format of two letters by 4 digits, check this box.

Time period during which the account was held (quarters) (e.g., first quarter 2012 through third quarter 2013)

*From (Quarter) — Select

*(Year) — Select

*To (Quarter) — Select

*(Year) — Select

Payer Information

*Please choose from one of the options:

○ My PACER fees are paid by one payer during the class action period. (second quarter 2010 through second quarter 2018)

○ My PACER fees are paid by multiple payers during the class action period. (second quarter 2010 through second quarter 2018)

Certification

* ☐ By checking this box, I declare that the information supplied in this Payment Notification Form is true and correct to the best of my knowledge.

Agree and Submit

*Required

EXHIBIT 2

Case No. 1:16-cv-00745-PLF

PACER National Veterans Legal Services Program, et al. v. United States II

Payment Notification Form

Payer Information

First Name

Last Name

*Firm Name

*Telephone Number

*Email

*Pacer Account Number

☐ If you have an Old Pacer Account Number that is in the format of two letters by 4 digits, check this box.

*Description

*Upload Proof of Payment (e.g., credit card statements, canceled checks, payment receipts)

Maximum allowed uploaded files: 5
Maximum file size: 10 MB
Allowed file types: .jpg, .jpeg, .tif, .tiff, .gif, .png, .pdf

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Choose File No file chosen

Certification

* ☐ By checking this box, I declare that the information supplied in this Payment Notification Form is true and correct to the best of my knowledge.

Agree and Submit

*Required

EXHIBIT 3

Case No. 1:16-cv-00745-PLF

Subject: PACER Fees - Payment Notification

According to PACER billing records reflecting account-holder information, you are associated with a PACER account that paid PACER fees during the class period.

On or about July 6, 2023, the Claims Administrator sent you notice via email informing you that the parties in *National Veterans Legal Services Program, et al. v. United States*, have reached a settlement for $125,000,000. As explained in the notice, there may be circumstances where an individual or entity paid PACER fees on an account holder's behalf. In those instances, the payer is the class member, not the account holder.

The Claims Administrator has been informed by an entity or individual that they paid PACER fees on your behalf and is thus the proper recipient of any settlement check associated with your PACER account (<Account Number>). If you believe this is incorrect, please visit <Dispute Link> to fill out and submit a Dispute Notification Form. The Dispute Notification Form will ask you for the Payment Notification Form (PNF) number. The PNF number is <PNF Number>. You must submit the Dispute Notification Form within ten days of receipt of this email. By not submitting a Dispute Notification Form you confirm that another entity or individual paid PACER fees on your behalf and waive all rights to contest entitlement to any settlement funds associated with your PACER account now or at any time in the future.

If you have any questions, please contact class counsel at pacerlitigation@motleyrice.com or 800-934-2792.

EXHIBIT 4

Case No. 1:16-cv-00745-PLF

KCC

Home | Class Notice | Court Documents | Frequently Asked Questions | Payment Notification/Dispute | Address Update

PACER National Veterans Legal Services Program, et al. v. United States II

Dispute Form

Account Holder Information

First Name | Last Name

*Firm Name

*Primary Address | Primary Address Continued

*City | *State (Select) | *Zip

*Country: UNITED STATES

*Telephone Number | *Email

Pacer Account Number: 3469807 | *Payment Notification Form Number

*Payment Period

*From (Quarter): Select | *(Year): Select | *To (Quarter): Select | *(Year): Select

*Upload Proof of Payment (e.g., credit card statements, canceled checks, payment receipts)

Maximum allowed uploaded files: 5
Maximum file size: 10 MB
Allowed file types: .jpg, .jpeg, .tif, .tiff, .gif, .png, .pdf

Choose File No file chosen
Choose File No file chosen
Choose File No file chosen
Choose File No file chosen
Choose File No file chosen

Certification

* ☐ **By checking this box, I declare that the information supplied in this Dispute Form is true and correct to the best of my knowledge.**

Agree and Submit

*Required

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	Civil No. 16-745-PLF NOTICE OF APPEAL OF CLASS MEMBER AND OBJECTOR ERIC ALAN ISAACSON

Notice is hereby given that Eric Alan Isaacson, a Class Member and Objector in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from the OPINION (DE169), and the FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS (DE170), that were entered March 20, 2024, as well as from any prior rulings, opinions, or orders that merge therein.

DATED: April 17, 2024

Respectfully Submitted,

Eric Alan Isaacson

LAW OFFICE OF ERIC ALAN ISAACSON
6580 Avenida Mirola
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
email: ericalanisaacson@icloud.com

RECEIVED
Mail Room
APR 18 2024
Angela D. Caesar, Clerk of Court
U.S. District Court, District of Columbia

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States that the foregoing statement that on April 17, 2024, I served my Notice of Appeal from the OPINION (DE169), and the FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS (DE170), by placing true and correct copies of said Notice in sealed envelopes, placed in the US mail with first-class postage prepaid, addressed to each of the following:

The Honorable Paul L. Friedman
U.S. District Court for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

DCDPACERFeesSettlement@dcd.uscourts.gov

Deepak Gupta
Gupta Wessler PLLC
2001 K Street, NW, Suite 850
North Washington, DC 20006

deepak@guptawessler.com

Brenda Gonzáles Horowitz
Assistant United States Attorney
Patrick Henry Building
601 D Street, N.W.
Washington, DC 20530

brenda.gonzalez.horowitz@usdoj.gov

Eric Alan Isaacson
(pro se)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al., Plaintiffs,	)	Civil Action No. 16-745
vs.	)	
UNITED STATES OF AMERICA,	)	October 12, 2023 10:12 a.m.
Defendant.	)	Washington, D.C.

* * * * * * * * * * * * * * * * * *

TRANSCRIPT OF SETTLEMENT HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN,
UNITED STATES DISTRICT COURT SENIOR JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: DEEPAK GUPTA
JONATHAN TAYLOR
Gupta Wessler LLP
2001 K Street, NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
Email: deepak@guptawessler.com

JONATHAN E. TAYLOR
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

MEGHAN S.B. OLIVER
CHARLOTTE LOPER
Motley Rice, LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
(843) 216-9492
Email: moliver@motleyrice.com

WILLIAM H. NARWOLD
1 Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676
Email: bnarwold@motleyrice.com

(Appearances Continued)

APPEARANCES (continued):

FOR THE DEFENSE:
BRENDA A. GONZALEZ HOROWITZ
DOJ-USAO
U.S. Department of Justice
601 D Street NW
Washington, DC 20530
(202) 252-2512
Email: brenda.gonzalez.horowitz@usdoj.gov

ERIC ALAN ISAACSON, PRO SE
6580 Avenida Mirola
La Jolla, CA 92037
(858) 263-9581

ALSO PRESENT:
WILLIAM MEYERS, General Counsel,
Administration Office of the Courts

RENEE BURBANK, Director of Litigation
National Veterans Legal Services Program

STUART ROSSMAN, Director of Litigation
National Consumer Law Center

DON KOZICH, Objector

Court Reporter:
Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter
U.S. Courthouse

This hearing was held via videoconference and/or telephonically and is, therefore, subject to the limitations associated with audio difficulties while using technology, i.e., static interference, etc.

Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Civil Action 16-745, National Veterans Legal Services Program, et al. versus the United States.

Counsel, please step forward to the podium and state your appearances for the record.

MR. GUPTA: Good morning, Your Honor. Deepak Gupta, class counsel for the plaintiffs.

THE COURT: Good morning.

Anybody else at counsel table?

MR. NARWOLD: Good morning, Your Honor. Bill Narwold from Motley Rice, also for the class.

Meghan Oliver --

THE COURT: Let me just say this. Since we have people on Zoom, the only way they can hear you is if you speak from a microphone.

THE COURTROOM DEPUTY: Counsel, would you please approach the podium.

MR. NARWOLD: Good morning, Your Honor. Bill Narwold, Motley Rice, also on behalf of the plaintiffs.

MS. OLIVER: Meghan Oliver, also with Motley Rice, on behalf of the plaintiffs.

MR. TAYLOR: Good morning, Your Honor. Jonathan Taylor, Gupta Wessler, also appearing for the plaintiffs.

MS. GONZALEZ HOROWITZ: Good morning, Your Honor. Assistant U.S. Attorney Brenda Gonzalez Horowitz; and with me I have William Meyers, General Counsel of the Administration Office of the Courts, on behalf of the United States.

THE COURT: Good morning to all of you.

MR. ISAACSON: Good morning.

THE COURT: Yes, sir.

MR. ISAACSON: May it please the Court.

Good morning. I am Eric Allan Isaacson. I am an objector. I will be speaking after their presentations. Thank you, Your Honor.

THE COURT: Thank you. Good morning.

All right. So just to set the stage, this case, National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice versus the United States of America, which I always refer to as the "Pacer case," was originally handled by my now retired -- and I must say quite happily retired colleague, Judge Huvelle. Judge Ellen Segal Huvelle had this case from its inception in 2016 until she retired, then I took the case over.

She considered the arguments of counsel about what services, shall we say, were properly payable through Pacer fees and what were not. The Pacer fees are fees that are

charged, as I understand it, to law firms and lawyers and to others who want to get, through the courts and the court system, information about cases in which they are not counsel. If you are counsel, you are notified automatically.

Now, all of this, of course, is a great thing because when I started as a judge everything was on paper and there was nothing electronic. Then we put all of the civil stuff on electronic filing, accessed it electronically. As Mr. Meyers will recall, if he has been around long enough, criminal was a little harder because of concerns about security for defendants and witnesses; but, eventually, we wound up having all civil and all criminal electronic filings; orders accessible electronically. You can sit in your office and be notified if you are counsel in a case about what is happening in your case. If it's not your case, and you are interested, you go on Pacer and you pay a fee.

Now, the only problem with the system is that it used to be if you didn't get to the courthouse by 4:00 or 4:30 you couldn't file. Now, if it's 11:59 p.m. you are still timely, which makes law clerks' work harder and makes lawyers' work harder. That's an aside.

As I recall, there are seven categories of things that Pacer fees are ultimately used for. When this was

before Judge Huvelle, she considered arguments from the plaintiffs and arguments from the government, the Administrative Office of the Courts, represented by the Justice Department; and she rejected both arguments. She found a middle ground and concluded that there were a great many things that the Administrative Office of the Courts was charging users for, but there were some things -- that were legitimate, but there were some things that were not.

She wrote an opinion, 291 F. Supp. 3d. 123, in which she explained her reasoning under the relevant statutes and legislative history, and the case then went to the federal circuit.

In reading their opinion, at 968 Fed 3d. 1340, as I understand it, the parties essentially made the same arguments they had made to Judge Huvelle in the federal Circuit, rejected both sides' arguments; agreed with Judge Huvelle, finding a middle ground. And like any district judge, I am sure she was delighted to read the first paragraph of the opinion in which the Circuit said: We conclude that the district court got it just right. As I tell my friends in the D.C. Circuit, they don't say that often enough.

As to the seven categories -- and you-all can correct me if I am wrong on any of this; I just thought it would be useful to try to, on the record, sort of set the

stage. I guess there were six categories.

As to the six categories, Judge Huvelle and the Circuit -- well, the first category is funding the operation of Pacer itself, and that was clearly fundable through the fees; then there were six additional categories. She said that funding the case management and electronic case filing system, which I just talked about, CM/ECF, was legitimate use of the fees; the electronic bankruptcy noticing, called EBM, was legitimate. There was a study called the "State of Mississippi Study," she said no; it was wrong to use the fees for that. Violent Crime Control Act notification system, she and the Circuit both said no. Web-based juror services, E-juror; again, no. And finally, courtroom technology, as I read it, you can correct me if I'm wrong, the Circuit said mostly no, but there were a few exceptions.

They explained the reasoning and why they thought she was right and concluded that Pacer fees, under the statute, are limited to the amount needed to cover expenses incurred and services providing public access to federal court electronic docketing information; and then they sent it back. They affirmed, and sent it back to Judge Huvelle for further proceedings consistent with their opinion.

That's where I come in and that's where you came in. Because after a lot of -- as I read it -- a lot of effort -- not to prejudge anything, arm's length

negotiation, a settlement agreement was reached which sets up, what would seem to me, to be kind of a complicated system but a necessary system to reach all of the users over the relevant years. And so, on remand, there was a lot less for me to do than might have been the case. After all was said and done, there was a settlement agreement concluded and filed.

Having reviewed that in the filings that you provided with it, I, on May 8, 2023, entered an order granting plaintiffs' revised motion for preliminary approval of class settlement and, then, the process to get us to today, the yin, including the notices sent out; and I am sure there will be some discussion of the adequacy of those notices and whether everybody was properly attempted to be reached and in all of the other things that you need to do to get where we are. And since then there have been numerous filings by the parties, briefs, affidavits, or declarations, and by some objectors as well.

So in scheduling the settlement hearing in Docket No. 112, in my order of October 4, 2023 -- I have earlier orders, too -- but it essentially set up how we were going to do this, and that people -- certain people could appear and speak if they wanted to virtually, and people here could speak in person. There would also be a public line for anybody who wanted to hear what goes on in these proceedings

but not participate.

Essentially, what I had set forth in this order was that we would start with the parties, the plaintiffs' class counsel in the United States, having up to 20 minutes to make opening remarks; and then I would hear from objectors. And anyone who had submitted a written statement and wants to be heard can have ten minutes to talk, and anybody who has not written a submitted written statement can have five minutes to talk if they're here. Counsel will have time to respond to those objections and to make a closing statement.

Then we, separately, will have an argument on attorney's fees, with each side getting 15 minutes to present their positions and to answer questions from me.

So unless anybody has anything preliminarily or procedurally you want to say before we dive into it, I guess we can start with the openings.

MR. GUPTA: Good morning, Your Honor.

I am Deepak Gupta, class counsel in this matter. It is an honor to be here to present this historic class action settlement for the Court's consideration at the final approval stage.

I just want to start by thanking the Court and the court staff for the work that went into arranging this hearing, thoughtfully, and for ensuring that the class

representatives, as well as class members, can appear and be heard today, both in person and remotely. We do have a couple of folks remotely on Zoom.

Before we begin, I would just like to recognize the people who are here in the courtroom this morning and remotely as well, without whom we never would have gotten to this point.

With me at counsel table, my colleague John Taylor from the Gupta Wessler firm, who was there from the very beginning and every step of this case. My colleagues Bill Narwold and Meghan Oliver from the Motley Rice firm, with whom we worked hand in glove; and Charlotte Loper as well from the Motley Rice firm.

If the Court has questions about the mechanics of notice or class administration, claims administration, my colleagues from Motley Rice, particularly Meghan Oliver, are here to answer those.

We also have four people here from the class representatives, both in the courtroom and via Zoom, that I would like to thank for their service in this case and introduce to the Court and indicate who will be speaking here today.

In the courtroom we have Jake Faleschini.

THE COURT: Say that more into the microphone, please.

MR. GUPTA: Jake Faleschini, he is the director of justice programs at the Alliance for Justice, and he is going to say a few words on behalf of AFJ in support of the settlement. Also in the courtroom we have Ryan Kelly, who is a staff attorney with the National Veterans Legal Services Program.

And via Zoom we're joined by Renee Burbank. She is the litigation director at the National Veterans Legal Services Program. She's sorry she couldn't be here in person today. She has plenty of experience with class actions; is actually a published expert on illegal exaction claims, of all things. She, too, will speak briefly in support of the settlement.

And finally, last but not least, Stuart Rossman is also joining us via Zoom from Boston; he is the litigation director of the National Consumer Law Center. He also happens to be a leading expert on class actions and class action settlements. He will say a few words this morning in support of the settlement. We will try to keep all of those statements brief.

So just a few words on the process first. Those who are unfamiliar with class actions might wonder why we have a big hearing when a case is settled. What is there to talk about? The case is over. The parties have agreed to settle it.

But a class action settlement like this one binds hundreds of thousands of people. People who haven't been necessarily participating in the litigation. And so it's essential to the process that the Court ensure for itself that the settlement is fair, that we allow people to have notice and an opportunity to be heard. And I think it's important not just that the settlement is fair, it's important that the public that will be bound understands that it's fair and that they have had a say in the matter if they want one.

So as the Court is well aware and, Judge Friedman, as you discussed earlier, we go through kind of a three-step process.

First, preliminary approval, which as you have mentioned, you have already done that.

Then the Court directs reasonable notice to all class members who would be bound; that, too, has already occurred here. We have given individual notice to about 500,000 people and publication notice as well.

The third step is where we are now, final approval. We have this hearing, we have objections, a public fairness hearing, and the Court considers whether the settlement meets the criteria spelled out in Rule 23.

We think we have extensively briefed all of the factors that the Court considers under Rule 23, so I am not

going to belabor them here unless the Court has questions. We believe it's clear that the class representatives and class counsel have vigorously represented the class throughout this long and hard-fought litigation.

We believe the settlement is the product of an informed arm's length negotiation; that the settlement relief provided to the class is adequate and, indeed, exceptional, particularly given the costs, risks and delays of potential further litigation which could well have occurred on remand for many more years; and that the settlement treats class members equitably relative to each other. Of course, the plaintiffs and class counsel support the settlement.

I do want to say a few words, if I may, about the unusual nature of this litigation because I think it does bear on the analysis.

Pacer fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until this case was filed, folks who care about this issue just did not see litigation as a realistic path to reform. As I noted in my declaration in support of the final approval portion, I have actually been aware of and focusing on these issues surrounding Pacer fees for a long time, going back two decades to my time as a staff lawyer at the

Public Citizen Litigation Group which works on transparency issues.

Despite much controversy and criticism, though, it was always assumed that a case like this could never be brought. First, because the judiciary has statutory authority to charge at least some fees. So no litigation on its own, just within the four corners of the litigation, was ever going to bring down the Pacer-fee paywall and result in a completely free Pacer system.

Second, a few lawyers with the necessary experience in complex litigation, one might say, would be crazy enough to sue the federal judiciary and spend substantial time and money over many years on an endeavor with little hope of payment.

Third, even if you could show that the fees were unlawful and excessive and obtain qualified counsel, it was still assumed that this was all beyond the reach of litigation because the judiciary is exempt from the Administrative Procedure Act and so injunctive relief would not be possible. Previous litigation had been dismissed for lack of jurisdiction. It was hard to know how there would be an alternative basis for jurisdiction, a cause of action, and a waiver of sovereign immunity.

So that is, in part, why this case is so unusual.

In the history of American litigation, this case

and this settlement are unique. This is the first-ever certified class action against the judiciary for monetary relief and the first settlement of such a case.

When we filed this case seven years ago seeking to hold the judiciary accountable for overcharging people for access to court records, I doubt that anyone in Vegas would have given us good odds. We were mounting a head-on legal challenge to a fee schedule that was set by the Judicial Conference of the United States, presided over by the Chief Justice. We were asking that the judiciary fork over millions of dollars to people who paid the fees.

But I think it is a testament to our judicial institutions that we could bring this case at all, a case against the federal court system in the federal court system, and that we were not laughed out of court. I am not sure if there is another nation on earth whose judicial institutions would have been as fair-minded and as open about such litigation.

It was not easy. It was risky. The Administrative Office was not used to facing litigation or discovery, and the Justice Department put up a strong fight. But we never felt and our clients never felt that our arguments were being ignored and rejected by the courts because of the identity of the defendant. To the contrary, judges at the trial level and the appellate level heard our

arguments, gave them fair consideration, and we think ruled effectively in our favor every step of the way.

I think you are right, Judge Friedman. Judge Huvelle chartered a middle path. She found liability and so did the federal circuit, unanimously. We defeated the government's motion to dismiss. We obtained certification of nationwide class in a case against the judiciary. Through discovery, we were able to shine a light on how the Administrative Office of the U.S. Courts had been using Pacer fees; bringing new facts to life and spurring action in the legislature. And that discovery, in turn, led to Judge Huvelle's unprecedented decision which, yes, it didn't give us everything that we asked for when we swung for the fences, but it did hold that the AO had violated the law by using Pacer fees to fund certain activities. Within months, the AO announced that those activities would no longer be funded with Pacer fees.

When we went up on appeal, we were able to muster extensive amicus support from retired federal judges, numerous media organizations, technology companies, libraries, civil rights groups. And the suit also garnered widespread media coverage that brought public awareness to these efforts.

Before long, the AO announced that it was doubling the $15 quarterly fee waiver, eliminating Pacer fees for

approximately 75 percent of Pacer users.

As you mentioned, we secured what we think is a landmark federal circuit opinion unanimously affirming this Court's summary judgment ruling holding that the judiciary had unlawfully overcharged people.

I think it's worth noting another thing that the federal circuit said besides that Judge Huvelle got it just right. The federal circuit also acknowledged the important First Amendment stakes here. It acknowledged that, as it put it, quote: "If large swaths of the public cannot afford the fees required to access court records, it will diminish the public's ability to participate and then serve as a check upon the judicial process," which is an essential component in our structure of self-government.

So a few words about the settlement itself.

After more than seven years, we now have a landmark settlement under which the government must reimburse the vast majority of Pacer users in full; 100 cents on the dollar for past Pacer charges. The settlement creates a common fund of $125 million from which each class member will be automatically reimbursed up to $350 for any Pacer fees paid in the eight-year class period. And the remainder, those who paid over 350, will receive their pro rata share of any remaining funds.

This is notable because, unlike most class

actions -- almost every class action I have been involved in -- there is no claims process; the money is distributed automatically to class members. By any measure, we think this litigation has been an extraordinary achievement and we think more so given the odds that were stacked against it. It has also sparked widespread public interest in the need to reform Pacer fees and has jump-started legislative action that continues until this day.

Following the federal circuit's decision, the House of Representatives passed a bipartisan bill, which is not something that happens --

THE COURT: It must have been a few years ago.

MR. GUPTA: It was a few years ago, but it did.

It passed just a few years ago. Even in these times, it passed a bipartisan bill to eliminate Pacer fees, and it really is truly a bipartisan effort; and the measure advanced out of the Senate Judiciary Committee.

The Judicial Conference, too, now supports legislation providing for free Pacer access to noncommercial users. If Congress were to enact such legislation, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone given the jurisdictional limitations.

Now, as I mentioned earlier, the purpose of a hearing like this is to hear from class members; and not

just the class representatives, but class members who pay may be opposed to the settlement and who wish to be heard. No case is perfect. Every settlement is a compromise. And of course, there are always things you wish you could accomplish. We wish we could have brought down the Pacer-fee paywall entirely, but we couldn't because of the jurisdictional limitations.

In any case of this size, with hundreds of thousands of class members, one anticipates at least some substantial number of objections, but this isn't just any class.

This is a class that comprises every federal court litigator. It includes law firms of all stripes, including the world's largest law firms; it includes journalists and media organizations; it includes sophisticated data companies with a lot of money at stake; and it includes a whole lot of pro se litigants. This is a class of rabble-rousers.

In the wake of the settlement, we saw not just extensive press coverage and public interest but, also, many inquiries from individual class members. Since the settlement, class counsel has responded to over 300 class member calls and emails.

THE COURT: Say that again. I didn't --

MR. GUPTA: 300.

THE COURT: 300 what?

MR. GUPTA: 300 class member calls and emails. Many of those communications involved multiple communications back and forth. They came from all manner of class members.

The class administrator KCC has received approximately 250 calls through its automated telephone line. So the objections here, I think, really are the story of the dog that didn't bark. None of the many organizations --

THE COURT: So they were all, these calls, to class counsel and to KCC?

MR. GUPTA: Correct.

THE COURT: Out of that number or that number plus, how many objections were actually filed?

MR. GUPTA: There were five objections that were actually filed, all of them pro se. One we may discuss later by someone we believe is not a class member, and I think only two that are appearing today. I may be wrong about that, we'll see.

THE COURT: One of the things -- and this may not be the appropriate time.

I think, in reading your papers, in addition to the five objections, you also mentioned something like 34 attempts to opt out, some of which may have come too late.

So at some point I hope you will address that or someone will address that.

MR. GUPTA: Yes.

Ms. Oliver has the statistics on that. I think that number is correct. I think that's the number of valid opt-outs. We are happy to discuss that.

But the point I am making is that there is a dog that didn't bark; no transparency groups, no law firms, no data companies, no groups that represent underrepresented litigants; none of them have come forward. I think that's a measure of the universal support for the settlement.

Of course, we want to hear from those objectors, and they have the right to speak today; and that's an important part of the process.

THE COURT: I have read all of the objections that have been filed thoroughly, including what Mr. Isaacson filed last night.

MR. GUPTA: But first, if I may, Your Honor, I would like to turn things over to the class representatives to just say a few words.

THE COURT: Sure.

MR. GUPTA: We can start with Jake Faleschini from the Alliance for Justice.

MR. FALESCHINI: Good morning, Your Honor.

THE COURT: Mr. Faleschini, good morning.

MR. FALESCHINI: Good morning.

My name is Jake Faleschini. I am the program director for the justice team at --

THE COURT: Could you spell your last name for the court reporter.

MR. FALESCHINI: Absolutely. It's F-A-L-E-S-C-H-I-N-I.

THE COURT: Thank you.

MR. FALESCHINI: I am with the Alliance for Justice.

I am happy to say that AFJ supports the proposed class action settlement and the accompanying requests for fees, costs, and service awards. AFJ is proud to have brought this case.

The Alliance for Justice is a national organization and alliance of approximately 150 public interest member organizations that share a commitment to an equitable, just, and free society.

Among other things, AFJ works to ensure that the federal judiciary advances core constitutional values and preserves unfettered access to justice for all Americans.

Our organization and many of our member organizations regularly use Pacer to access court documents for research on how court cases impact the issues that we care most about.

When the courts charge exorbitant fees for access to these documents, it puts our organizations at a disadvantage vis-à-vis more wealthy interests. In practice, it gatekeeps access to important information, public information, and it limits our collective ability to inform the public about those happenings.

AFJ served as a named plaintiff in this class action since its filing in April 2016, a period of more than seven years. For much of that time until his departure for a position at the U.S. Senate last year, AFJ's legal director, Daniel Goldberg, oversaw this litigation on AFJ's behalf. Among other things, Mr. Goldberg received updates on motion practices and court rulings from class counsel, reviewed draft pleadings, consulted on strategy, and provided a declaration in support of class certification on AFJ's behalf.

I understand that counsel will seek a service award for AFJ of $10,000. We conservatively estimate that the value of the attorney time incurred by AFJ over the seven-year life of this case exceeds that amount when calculated at market rates.

Thank you, Your Honor.

THE COURT: Thank you.

MR. GUPTA: Next, Your Honor, if she's available by Zoom, Renee Burbank from the National Veterans Legal

Services Program would like to speak.

THE COURT: Yes. Ms. Burbank.

MS. BURBANK: Good morning.

I am on Zoom. Can you hear me?

THE COURT: We can hear you. Thank you.

MS. BURBANK: Thank you, Your Honor.

As the attorney just said, my name is Renee Burbank; spelled B-U-R-B-A-N-K. I am the director of litigation at National Veterans Legal Services Program, also known as NVLSP.

We're a national nonprofit veterans service organization and we represent all manner of active-duty personnel and veterans when they are seeking benefits from the federal government due to their service and disabilities incurred or made worse through their service.

As an organization, NVLSP represents thousands of veterans every year in court cases, including class actions and individual representation; and we provide education and research on the state of the law to advocates all over the country.

Veterans overall, however, largely proceed pro se without attorney representation when they go to the courts to obtain benefits from the government. And in order to understand the state of the law, access to federal public dockets is critical. Specifically for NVLSP, we spend many

hours every year researching the law all over the country and what is happening with veterans' benefits and other Department of Defense-related activities that affect the benefits and recognition that our military and veterans have earned.

As you have already been apprised by Alliance for Justice, we strongly support the settlement and the fees and costs that reflect the complexity and unique nature of this litigation.

NVLSP, as one of the named plaintiffs in this class action, has spent a considerable amount of time and effort on this case, understanding the filings as they were being drafted, and providing input prior to class certification, and to also understand and be able to tell others about the status of the Pacer litigation. Because NVLSP is the first-named plaintiff, we have also received some of those inquiries; we forward them to class counsel when we receive them. But we did get some information or, rather, inquiry from individual class members wanting to know about this important case.

The time that we have spent, the approximate amount of billing rates that we would have for the time incurred that NVLSP has spent is reflected in my declaration previously filed with the Court. And I think that that declaration, as well as Attorney Gupta's explanation today,

adequately and accurately explains why the settlement is appropriate in this case. NVLSP agrees with that assessment, and we support the settlement.

Thank you, Your Honor.

THE COURT: Thank you very much, Ms. Burbank.

MR. GUPTA: And finally, Your Honor, Stuart Rossman, the litigation director of the National Consumer Law Center is also with us.

MR. ROSSMAN: Thank you very much, Your Honor. I hope you can hear me.

THE COURT: Yes.

MR. ROSSMAN: I just want to thank you for allowing me to appear from Boston by Zoom. It's a pleasure to be able to appear before the Court in support of the settlement in this particular case.

As it has already been stated, the National Consumer Law Center has been a named class representative in this case from its inception.

National Consumer Law Center is a 54-year-old organization, originally partnered with the Legal Services Corporation where we served as the national support center on behalf of legal services in the area of consumer law. Since 1995, we have been a private nonprofit 501(c)(3) organization.

We represent the interests of low-income consumers

in the areas of consumer finance, affordable home ownership and access to utilities. As such, there are two areas in which NCLC is highly dependent on access to the federal court records through the Pacer system. NCLC is the publisher of a 22-set -- volume set of consumer law manuals which rely heavily on federal law, specifically on federal consumer laws, which, obviously, are updated on an annual basis. At this point we're digital, so they're being uploaded on a daily basis. And as an organization, we make heavy use of Pacer ourselves in order to be able to maintain our materials.

Beyond that, however, working with our primary finance, which is not the direct service for consumers [sic] but the lead services organizations that represent them, legal services and public interest organizations, all rely upon access to Pacer in order to provide representation to their clients under the statutes like the Fair Lending Act, the Fair Credit Reporting Act, Fair Debt Collection Practices Act, Economic Opportunity Act -- I can go on.

Virtually all of the consumer laws in the United States are based upon federal statutes that were enacted from 1968 to the present.

So, therefore, having access to Pacer, these are nonprofit public-interest organizations and legal services organizations that have limited resources and, therefore,

the effort that was put into this case by the attorneys who brought the litigation has direct impact not only on my own organization but the groups that we serve as a national service organization with national resources for legal services organizations.

I do want to comment as well in terms of the service award that is being requested on behalf of National Consumer Law Center. I have been involved in this case since its inception seven and a half years ago. I must say that I outlasted the judge on the case but I am, in fact, going to be retiring at the end of December of this year --

THE COURT: At the end of when? When are you retiring?

MR. ROSSMAN: At the end of December.

THE COURT: So you would love me to approve the settlement and approve it before you retire?

MR. ROSSMAN: You know, I would be more than happy. But since anything that you approve is going to be going to my organization, whatever we receive we would greatly appreciate it.

I am looking forward to retirement. My wife retired two years ago and every morning she reminds me how good retirement is.

THE COURT: You know, I have been a senior judge for some time; and what you just said, I hear that at home a

lot.

MR. ROSSMAN: Yes. There are some vacations and trips that we have not been able to do, along with spending some time with my grandchildren which is something that -- actually, what I really want to do is *The New York Times* crossword puzzle the day after --

THE COURT: My wife prefers Friday and Saturday because they're the hardest.

MR. ROSSMAN: I agree, Your Honor. It is a great motivation (indiscernible).

In any event, I have not only reviewed the pleadings in this case. I filed a declaration to the Court to support class certification. We provided discovery in this case. I have gone back and checked my time records on it. I have spent more than 250 [sic] hours working on this case over the last seven and a half years. And at my current billing rate in Massachusetts, that would well exceed the amount of the service award that is being requested on behalf of the National Consumer Law Center.

I am happy to be able to respond to any questions you have about the work that we have done in this case.

I will just finish by saying that over the last 25 years as the NCLC litigation director, I have been of counsel or co-counsel in over 150 class action cases. It's an unusual situation for me to be a client. It's been an

eye-opening experience for me. I suspect it's been an eye-opening experience for my counsel whom I have challenged on occasions during the course of the last seven and a half years. But I think they have done an outstanding job in terms of the work that they have done in this case as well as the outcome it has achieved. We are highly satisfied and we completely endorse the settlement going forward.

So I thank you very much for the time that you have given me to speak, Your Honor, and I am happy to answer any questions that you have.

THE COURT: Thank you very much, Mr. Rossman.

Mr. Gupta.

MR. GUPTA: That's all we have for our opening representation. Thank you.

THE COURT: Then I will hear from the government.

MS. GONZALEZ HOROWITZ: Good morning, Your Honor.

Thank you for an opportunity to have the parties and the class members appear before the Court today to discuss the settlement approval in this, I think, as Mr. Gupta called it, a landmark class action case.

Your Honor, you are aware that your task today is to determine whether the proposed settlement is fair, reasonable, and adequate for the class members.

You need not decide that settlement is perfect or that it's even the best possible. Stated another way, the

Court must examine whether the interests of the class are better served by the settlement than by further litigation.

In evaluating that, the Court should determine whether the settlement is adequate and reasonable and not whether a better settlement is conceivable.

As demonstrated by both parties' filings in the evidence and information that's been provided to you, this settlement is an outstanding result; I think, as Mr. Gupta called it, landmark for the class members and more than meets the legal requirements for final approval.

This Court is well aware of the general principle that settlement is always favored, especially in class actions, where the avoidance of formal litigation can save valuable time and resources; the same is certainly true here. As Mr. Gupta said, no settlement is perfect.

The United States concurs with plaintiffs that this Court should grant final approval. The settlement proposal was negotiated at arm's length, the relief provided for the class is more than adequate, and the proposal treats class members equitably relative to each other. Although the parties address these factors extensively in their filings, I would like to take a moment to address these today.

First, although I was not personally involved in the mediation and negotiation phase of this litigation, the

record before the Court amply demonstrates that the settlement proposal was negotiated at arm's length.

As noted in the parties' filings, the parties appeared before an experienced mediator with both parties recognizing the litigation risk in moving forward.

The government vigorously defended this action from its inception, as the Court mentioned earlier today in its opening remarks and as Mr. Gupta discussed when giving some of the procedural history and background of this case.

The Court and, later, the federal circuit upheld certain electronic public access expenditures, while finding that the Administrative Office of the Courts exceeded its statutory authority as to others. This has been a hard-fought litigation for a significant period of time. The parties engaged in informal discovery prior to settlement discussions and, thus, were well informed.

As other judges in this district have noted, in the absence of any evidence or collusion or coercion on the part of the parties, the Court has no reason to doubt that the settlement was the product of legitimate negotiation on both sides; and the Court certainly has no reason to doubt that here.

Second, the settlement provides for a common fund of 125 million, and will provide a full recovery of up to $350 to each class member for fees paid during the class

period, with the remaining funds to be distributed on a pro rata basis to those class members who paid more than $350 in fees during the class period. This relief is more than adequate especially considering some of the risks to the class which I will address momentarily.

There is nothing inequitable about the plan of allocation and distributing payments pro rata with a guaranteed payment up to a certain amount in a common fund case such as this one is not unusual.

As reflected in the parties' filings, the allocation plan was the result of a compromise between the parties and supports the Administrative Office's long-standing policy of access to judicial records.

This principle is even more forceful here where the E-Government Act allows for differentiation between individuals. Consistent with the statutory notes articulated in 28 U.S.C. Section 1913, the statute permits electronic public access fees to, quote: "Distinguish between classes of persons and shall provide for exempting persons or classes of persons from the fees in order to avoid unreasonable burdens and to promote public access to such information."

As one of the objectors recognizes, differentiation between class members can be permissible when it is justified; and in this instance, it is certainly

justified considering the Administrative Office's interest in ensuring public access especially to individual and smaller users.

The settlement distribution will ensure that the average Pacer user receives full compensation up to $350 which, for many users, will result in a full compensation of all fees paid. In other words, the settlement is consistent with congressional intent.

Moreover, efforts taken by the judiciary to ensure that public access fees do not create unnecessary barriers or burdens to the public have resulted in an allocation of the vast majority of Pacer maintenance costs to the system's largest users, which are typically commercial entities that re-sell Pacer data for profit. That comes from the report of the proceedings of the Judicial Conference of the United States in September of 2019.

To address the concerns lodged by objectors that the settlement either favors small users or institutional ones which I think, as the parties have noted, are diametrically opposed objections or does not favor institutional users enough, the settlement is a marriage of the parties' litigating positions which, in the end, is the hallmark of compromise. The settlement need not be perfect but, rather, reasonable.

Finally, Your Honor, I want to address the terms

of the settlement in relation to the strength of plaintiffs' case. It is the government's position that absent a settlement, the class would have faced significant difficulty in demonstrating that the Administrative Office would not have used the funds on otherwise permitted categories. This was a position that the government took at all stages of the litigation; and as with any litigation, of course, there are risks to both sides if the case were to proceed. But especially here, the results achieved are extraordinary when compared to the difficulties the class may have if the litigation were to move forward. That, of course, is without even considering the time, expense, burden, and resources that the parties and, of course, the Court, in turn, would expend if the case were to proceed to additional discovery on damages and later to trial. These factors only further counsel in favor of approval of the settlement agreement.

Because the Court has a lot of time at the end of the hearing to discuss plaintiffs' motion for attorney's fees, service awards, and costs, I will not address that here other than to say that the government, in its response to plaintiffs' motion, raised some questions in general principles for this Court to consider in determining the ultimate award.

In sum, Your Honor, we concur with plaintiffs in

the class that the Court should approve the settlement. Thank you.

THE COURT: Thank you.

So it seems to me now, under the schedule I've set, at some point I want to hear from Ms. Oliver about the opt-out question. But I think at this point I will hear from Mr. Isaacson who is here and has filed a number of things; one a while ago and one last night.

He is here in person to speak to his objections. I am happy to hear from him. Later I will hear from other people if they want to be heard.

So good morning, sir.

MR. ISAACSON: Good morning, Your Honor.

May it please the Court.

I am Eric Alan Isaacson, a member of the class to be bound by the settlement. I filed a timely objection on September 12 and in response to this Court's order regarding the hearing. And preceding the hearing, I filed a written statement that indicated my intent to appear here in person, not remotely, as Mr. Gupta's filing stated. Also, to address some of the filings that they did, I think that they were after the fact and late when it comes to the requirements of Rule 23.

I think that the primary fairness problem with this settlement -- well, I think there are two serious

fairness problems with the settlement. Rule 23 asks whether the settlement treats class members equitably with respect to one another.

The big problem is that, as Mr. Gupta says, this class includes the world's largest law firms. The world's largest law firms are very sophisticated and they did not file an objection. They didn't file an objection because they know that they got fully reimbursed for their Pacer expenses years ago. They bill in 30-day cycles. They pay Pacer bills, and the clients then reimburse them for the Pacer bills. Class counsel in class actions that almost always settlement, almost always produce a settlement fund from which the class action law firms are fully reimbursed for their Pacer expenses.

You have got a class that includes a lot of very large Pacer users that spent a lot on Pacer; they got fully reimbursed for it. And you have got a claims process -- well, it's not a claims process. They brag that there are going to be no claims made, which means they are not even asking people: Have you been reimbursed for your Pacer expenses?

THE COURT: So at this point, I take it, is that when the big law firms bill their clients quarterly or whenever they bill, they included -- they say: In doing legal research for you on this matter, we used Pacer, and it

cost X dollars, and we're billing you for that.

MR. ISAACSON: Yes, Your Honor. That would be my understanding.

I worked in a large law firm for about three years at the beginning of my career. I worked at large plaintiffs' class action firms for the majority of my career. My understanding is that the law firms that are going to be some of the biggest claimants are going to receive the biggest payments over the pro rata distribution part of this settlement -- have already been fully compensated.

Now, one way to address that was the government's position that you had to have a large minimum payment. You have got a large minimum payment and they ended up getting negotiated down to $350. If it's a large minimum payment, double that or three times that, you are still dealing with people getting the minimum payment who are members of the public, who are not in a class that have been reimbursed for this stuff; that would be one way to deal with it. The settlement is unfair if it does not have a larger minimum payment and does not ask large claimants or large payees: Have you been reimbursed? I think it treats class members inequitably relative to one another.

I think it's very ironic that the government, in the settlement negotiations regarding the allocation of the

funds, did a better job advocating for the public interest and for the interest of class members who haven't been reimbursed than did class counsel.

There may have been arm's length negotiations in the settlement process with respect to the total amount of the settlement. But when it comes to the allocation of the funds, the government's position was preferable to the plaintiffs' class action lawyers; I think that's most unfortunate.

It is, I think, not coincidental that plaintiffs' class action firms like themselves benefit from a low minimum amount and high allocation to the pro rata distribution.

I think that the $10,000 service awards are problematic, I think, according to Supreme Court authority, Supreme Court opinion; I addressed that in my papers.

With respect to the settlement adequacy as amended in 2018, Federal Rule of Civil Procedure 23 requires the Court, in evaluating adequacy of the settlement to consider, and I quote: "The terms of any proposed award of attorney's fees." That's Rule 23(e)(2)(C)(iii).

THE COURT: Hold on one second.

Which part of 23?

MR. ISAACSON: Rule 23(e), which deals with settlement approval in class actions.

THE COURT: Right.

MR. ISAACSON: Subsection (2), Subsection (C), Subsection (iii).

THE COURT: So it says that: If the proposed class -- only in finding it's fair, reasonable, and adequate after considering the following. And (C)(iii) basically says --

MR. ISAACSON: Which I think --

THE COURT: -- that the class represented class counsel -- I'm sorry, that the relief provided for the class is adequate taking into account the terms of any proposed award of attorney's fees including timing of payment.

So essentially, as you read this, there are two questions on attorney's fees: One is, are they entitled to attorney's fees? And secondly, how much?

MR. ISAACSON: Yes, Your Honor.

THE COURT: And this says that in determining adequacy I have to consider both of those?

MR. ISAACSON: Yes, Your Honor.

In considering adequacy of the settlement, you need to consider that. The reason is because in class actions there is a tendency for class action lawyers to settle cases on terms that guarantee themselves large attorney's fee awards; in this case, four or five and a half times their reasonable hourly billing rates if you look at

their lodestar -- their claimed lodestar, and compare it to the fee award that they're asking for.

This is a case where class counsel has come in and said: We have got a quarter of the damages in this case -- because it's apparently a $500 million case according to their expert Professor Fitzpatrick -- we have got a quarter of the damages in this case, give us four times our billing rates. I don't think that's appropriate, Your Honor.

I think that it's going to be necessary, if you want to approve the settlement, to dramatically reduce the attorney's fees that they're requesting.

Now, they didn't document their lodestar; that's a problem. I think that's designed, quite frankly, to force the Court to choose to do a percentage award rather than a lodestar award. I don't think that it's ethical for class counsel to do that. I think they need to provide the data that would be necessary for the Court to make the choice. And all of the circuits except for the District of Columbia Circuit and the Eleventh Circuit have held that that is a choice for the Court to make.

THE COURT: Choice between what?

MR. ISAACSON: Between lodestar award and percentage of the fund award.

THE COURT: What about the federal circuit?

MR. ISAACSON: The federal circuit I think

indicates that you can choose between the two, you have discretion. But it is not something that they can force.

I think the recent *Health Care Republic* [sic] case strongly indicates you ought to do a lodestar cross-check.

THE COURT: A lodestar cross-check is different from a lodestar. In other words, as I understand it -- we are going to talk about this more later.

As I understand it, there are cases in which you apply the lodestar. We used to call it -- I forget what it used to be called, the U.S. Attorney's matrix, the D.C. Attorney General's matrix, the Laffey Matrix. We have all of these things in this court which applies to certain kinds of cases and in certain cases. Then there are the common fund cases which, I believe -- and we will talk more about this later. The case law seems to suggest that a percentage of the fund is more normal than the lodestar, but there is then the discussion of a separate thing called the lodestar cross-check. So there is the lodestar versus the percentage of the fund, and then there is: When you do a percentage of the fund do you also do a lodestar cross-check, and is that something judges have the discretion to do or not do to satisfy themselves or to do a, for lack of a better word, cross-check, or is it something that some courts require be done?

I don't want to -- you can continue talk about

this. I will let you talk later this morning when we get to the separate discussion of attorney's fees; I will let you get up again and talk some more about that in response to what counsel says.

In my mind at least, there is a vast difference between a lodestar and lodestar cross-check; they serve different functions.

MR. ISAACSON: Your Honor, my understanding is the Court is supposed to act as a fiduciary for the class.

THE COURT: I agree.

MR. ISAACSON: If we go back to the earliest common fund cases, the Supreme Court in *Greenough* says the Court needs to act with a zealous regard for the rights of the class. And you need to -- in evaluating whether to do a percentage award and the amount of the percentage award, consider whether it's going to cause a windfall to class counsel, which I think, in this case, it does because they are saying: We recovered one quarter of the damages in this case, give us four times our claimed lodestar. Which they haven't really documented, and they haven't documented the fees. They end up having supplemental submission from both Fitzpatrick and Rubenstein supporting their fee application on reply. I think that's inappropriate because Rule 23(h) says that they're supposed to put in the supporting documentation in connection with the motion. I think it's

unfair and improper to put it in on reply both because, ordinarily, you don't get to introduce additional evidence on reply and because Rule 23(h) required them to file that stuff before the objections were due.

I think it's also important to realize that even if a judge is not going to go through line by line in their lodestar submissions and billing submissions, even if class members, for the most part, aren't going to be sophisticated enough to go through line by line, if those filings and that evidence is made a part of their public record that other folks may do it.

In the *State Street* securities fraud litigation there was settlement in the District of Massachusetts. A reporter for the Boston Globe went through the fee applications after the district judge had approved the attorney's fees and said: Hey, there is a guy that gets paid a lot of money but didn't do anything. What's up? Said: Hey, there are folks who billed time and they are being compensated more than once for it, more than one law firm they were working for at the same time for the same fees. It's important for transparency that they have a complete filing of the information.

Now, in this case, I think a fee award of five percent would more than cover their claimed lodestar and would be more than adequate and would address the concerns

that I have got.

When it comes to presumptions with respect to fees, the *Health Republic* case says that you can't presume that the fee application is appropriate. You have got to be very critical of it.

The Supreme Court in *Perdue* said it's presumptively sufficient for class counsel to get an unenhanced lodestar award that presumptively covers the costs and risks of class action litigation and that if they want more than that they need to demonstrate with clear evidence why they need to get more than that.

THE COURT: Okay.

MR. ISAACSON: In this case, I think that goes to fairness of the settlement.

Now, if I am going to be able to address the fee issues after they speak about fees --

THE COURT: Yes.

MR. ISAACSON: -- I will wait for that.

Thank you very much, Your Honor.

THE COURT: Thank you very much, Mr. Isaacson.

Are there any other objectors in the courtroom or on Zoom who want to be heard? Any objectors?

I see someone.

MR. KOZICH: Yes, Your Honor.

THE COURT: Mr. Kozich, yes, sir. Mr. Kozich has

filed a written objection which I have read. I will hear from you, Mr. Kozich.

MR. KOZICH: Thank you, Your Honor.

One of the persons who spoke said there were 500,000 users who were actually entitled to some sort of reimbursement for their Pacer fees; and they never had an accounting of who is going to receive what money from the settlement.

Now, one of the other attorneys that I know is a class member -- but I am not a class member because -- basically saying that I didn't pay Pacer fees in a time that is a class period.

I remember that I did pay Pacer fees during that time but I was only able to find invoices that I submitted to the Court. The Pacer people tried to do a check on me, they couldn't find my account at all. So I don't know if Pacer purposely lost my account or whatever. I am claiming that I am a class member and I would like to present my argument now.

Now the --

THE COURT: Are you objecting to aspects of the settlement or are you objecting to the fact that you are not being included in the class and getting your fair share, or both?

MR. KOZICH: Both, Your Honor.

THE COURT: Okay. Go ahead.

MR. KOZICH: Okay. The government entered into it in December of 2002. It mandates that Pacer cannot charge beyond the margins -- marginal cost of document production or transmission. Transmission time is at the speed of light, so at 186,000 miles per second; therefore, transmission time is much less than one second and certainly less than one cent per page to transmit. All of that money, the pennies that it cost to transmit, they already had the documents, they're just transmitting the documents, it's proper to pay Pacer.

The defendant instituted excessive Pacer fees. I only have two documents; one from August 18th of 2014, and one from April 1st, 2017, which is charging ten cents per page for excessive fees. So the period of time to then come back before 4/21/10 [sic] because they're charging excessive fees back then too.

Ten cents per page is what Office Depot charged before COVID. It includes costs of copier, toner, drums, paper, electricity, copies. Pacer did not incur any of these costs, only the cost of transmission, because the document is already there.

The lawsuit was filed in 2016. Class period is from April the 10th, 2010, through May 31st of 2018. This period is why we cut off so -- just a short period of time

at any time before April the 10th or after May 31st of 2018, when Pacer was charging ten cents a page.

Who picked the period? I don't know who picked the period. Pacer users who pay less than $50 in excessive Pacer fees -- I didn't pay my Pacer fee, but you see $250 because I am a disabled veteran. And I was looking for issues regarding the housing tax credit properties. I had an issue with the Broward County Housing Authority. I was researching records of California, Oregon, Washington, and all over the country, actually, for help with my case. So I didn't pay the Pacer fees because I couldn't afford it, the high fees. Pacer cut me off from using Pacer, and I am still cut off from Pacer. I guess Pacer could waive the fees; they haven't done that.

And then for the quarter ending for the year ending 2010, Pacer had a net profit of 26,611,000.15 as part of my filing of 163, Exhibit E, extrapolating a period, which is a period of 37 quarters; basically at a net profit for 2010, $984,626,129.

If you take over the settlement, there is still a net profit of $859,626,129 [sic]. Net profit. It's not supposed to be making a profit, they're supposed to be dealing at cost. That money should be distributed to the users who pay the excessive fees so that they can be made whole. They are not being made whole by the settlement.

I presented evidence that I owed $354.67 in Pacer excessive fees for the period July 1st, 2015, through September 30th, 2015. My account number is 2792766.

I remind the Court that Pacer couldn't find my account. So I don't know what they did with it; they lost it or something.

I am opposed to the settlement because people are not being made whole. It's the big large law firms, big corporations, and the big nonprofits that are making most of the money because the small guy who you see incur fees is not going to be made whole and maybe deserves to be made whole by the settlement.

I am opposed to the settlement. I would like to know how -- who the money is going to go to before the Court reaches a settlement on the amount that's being distributed. I think the nonprofits and big corporations is taking a big chunk of the money, and the small guy is not being made whole. Thank you, Judge.

THE COURT: Thank you very much, Mr. Kozich.

Are there any other objectors in the courtroom or on Zoom that want to be heard?

I don't hear anybody speaking up.

As I understand it, and as I have -- I have read all of the objections. In addition to Mr. Isaacson and Mr. Kozich, there are only three other objectors: Geoffrey

Miller, Alexander Jiggets, and Aaron Greenspan. I have read their objections, and none of them are here on Zoom or otherwise. None of them indicated that they wanted to be heard today.

So I would suggest that maybe a logical thing to do is to now hear responses to the objections. You don't need to use the full time, use whatever time you need, the same for the government, and then we'll take a break. Then I will hear from Ms. Oliver on opt-outs and from whoever is going to speak about attorney's fees. I think we should deal with the objections, both the written ones and those who spoke today to support their written submissions.

Mr. Gupta.

MR. GUPTA: Thank you, Your Honor.

I will try to be brief but, of course, I want to be sure I answer any questions the Court has.

THE COURT: Yes.

MR. GUPTA: I do think we have tried to adequately brief the responses to the objections. I can discuss Mr. Isaacson's objection first.

We thought it was interesting that you had two sort of diametrically opposed objections. You had Mr. Miller's objection. The complaint there is, we are favoring the small users by compromising with this minimum distribution. Mr. Miller's complaint was: We're favoring

the little guy over the big guy.

Mr. Isaacson's complaint, as I understand it, is precisely the opposite. He is saying: You are favoring the big guy over the little guy. I suppose maybe that's a measure of the fact that it's a compromise and we met somewhere in between with the two positions.

I find Mr. Isaacson's objection, in particular, a little difficult to understand because what he is saying is, in his words, is grossly inappropriate was that we advocated for a pro rata distribution of the funds; that was our position in the negotiations with the government.

As we say in our reply brief, the Supreme Court has said that a pro rata distribution is the typical measure of fairness, both in modern class actions and in equity. Fair treatment -- the Supreme Court said in *Ortiz* -- is assured by the straightforward pro rata distribution of proceeds from litigation amongst the class. It's hard to understand how our advocacy for a pro rata distribution somehow ill-served the class or how this structure discriminates against the small users on whose behalf we brought this case.

If you look at the class representatives, you can see that the whole point of this case was about access to justice for the little guys, as it were.

Mr. Isaacson points out that large law firms often

will seek reimbursement from their clients for expenses like Pacer fees. This is something we gave considerable thought to, both in bringing the case and also in settling the case.

I just wanted to draw the Court's attention to a footnote in our reply brief because it can get missed; a footnote at page 5. We actually found a case. It's a case from the Northern District of Illinois where a similar kind of objection was made to a class action settlement; the idea being that: You have this settlement with respect to certain charges but, then, there might be a dispute with other people, a matter with other people who reimburse those charges.

What the law has always said here -- and this is a long-standing legal principle that is true in Tucker Act cases as well -- is that the claim is held by the person who was subject to the illegal government charge; in that case, that would be the person who paid the Pacer fees. Any downstream issues with respect to reimbursement by other people is a matter between those people and those other people.

That said, because we expected this issue to occur and because we heard about it in the notice period -- I think, actually, you may recall, Judge Friedman, we mentioned this issue to you before final approval as a potential issue. We have actually worked with the class

administrator. There is a form on the website that allows people to indicate whether or not they paid Pacer fees for somebody else or whether they are being reimbursed.

THE COURT: Say that again.

MR. GUPTA: There is a form on the website that allows people to indicate whether they paid Pacer fees for someone else. The attempt there is to try to -- to the extent possible -- resolve those questions so that they don't become a problem in administering the settlement.

THE COURT: Is the way it works -- if you get information through this form, what do you do with the information?

MR. GUPTA: I think Ms. Oliver, who is our liaison in cases, is in a much better position to address this.

I just -- I do want to emphasize, though, I think this is a question now -- we're turning to a question of how we're administering the settlement but not -- the certain fairness question in this process.

THE COURT: Wait. Before I turn to Ms. Oliver, I think what I heard you say is that there is a case law --

MR. GUPTA: Yes.

THE COURT: -- that says that -- in terms of not -- settlement of the class action, that if you -- to paraphrase: If you are to be reimbursed by some third party, not a member of the class --

MR. GUPTA: Right.

THE COURT: -- it doesn't disqualify you from getting the pro rata; it's between you and those other people.

MR. GUPTA: Correct. As a legal matter, that's the answer to Mr. Isaacson's question.

THE COURT: That's the legal answer.

MR. GUPTA: That's the legal answer.

But we didn't kind of want to stop there because we know that this is a real-world issue. What Ms. Oliver is now going to tell you about is how we have tried to resolve this as a real-world problem.

THE COURT: Come to the microphone, Ms. Oliver. Thank you.

MS. OLIVER: So there were two forms on the website: One was a payment notification form and the other was an accountholder notification form. They do two things. The payment notification form allowed the actual payer of the fees to get onto the website and submit information notifying the administrator that they paid Pacer fees on behalf of someone else. That can be any scenario. That can be an employer paying for an employee's Pacer fees; it can be a client who actually paid -- they were passed through the law firm to the client; that can be any particular scenario. There are not limitations on the website as far

as who can submit those notifications.

There is also a form that allows accountholders to notify the administrator that somebody else paid their Pacer fees for them. And although they were the user, somebody else paid the Pacer fees.

Once those notifications were submitted -- once the payment notifications, so somebody notifying the administrator that they paid Pacer fees on somebody else's behalf -- once those were submitted to the administrator, the administrator then sent an email to the accountholder associated with that account, that was the subject of the notification saying: Hey, we have received a notification; somebody has told us that they paid Pacer fees for your account. If you would like to dispute this, you have this long to dispute it; and you can submit this information, we'll then process the information.

Through that process, we have received zero disputes. We have received hundreds of notifications. We have received 409 of the payment notifications, and zero disputes to any of those 409 payment notifications.

THE COURT: Thank you.

MR. GUPTA: So that is really all I wanted to say about Mr. Isaacson's fairness objection.

Unless the Court has questions.

I would like to turn to one other issue that he

has raised because it's a legal question.

THE COURT: That he has raised.

MR. GUPTA: That he has raised.

He has objected to the service awards for the class representatives. And the reason I want to mention --

THE COURT: Now, the service awards are the kind of things that the three who spoke earlier on behalf of the named plaintiffs were talking about.

MR. GUPTA: Right.

THE COURT: Which is, as I understand it, their incentive for participating in the -- being up front and being the named plaintiffs, and all of that. But in addition, they all spoke to the amount of time they, in fact, actually spent, their institutions actually spent --

MR. GUPTA: Right.

THE COURT: So if you viewed it as a pure incentive -- and you can tell me whether I have got the concepts right -- that might be sufficient under the case law.

But in addition, they say here: Even if we had to prove that if I were billing what my ordinary rate is or, as counsel, if I don't have an ordinary rate, the number of hours I spent, it would have added up to more than 10,000 anyway, no matter how you slice it.

MR. GUPTA: That's right. That's right.

You have got it exactly right. Maybe you have just taken the words out of my mouth.

The reason we're teeing this up is that Mr. Isaacson has made this objection in many, many class action settlements. And the legal argument rests on this Supreme Court case from 1882, the *Greenough* case. It drew this distinction between the expenses that occurred kind of in the fair prosecution of the case, which can be things like attorney time, and something else which was disapproved which was -- I mean, this is a case before class actions; but you had a bondholder who asked for, basically, a personal salary for having handled a case that benefited a lot of people. And the Supreme Court said no, you can't have that.

So Mr. Greenough's [sic] legal argument is that the modern-day incentive award or case contribution award for class representatives, in his view, is impermissible under that case law. We think he is wrong. Virtually every court that has addressed the question has disagreed with him, but he has gotten some courts to agree.

What we're saying is: This case does not even tee up that legal question because even if you were to accept the distinction that he is drawing, we fall on the correct side of the line. In other words, even if 1882, if you want to think about it that way, the time that these class

representatives' lawyers have spent on this case more than justifies these modest service awards. So that's the only reason I wanted to tee that up.

I don't want to be presumptuous, but if the Court is going to approve the settlement and write an order, I think it would be helpful to point out that we fall on the correct side of that line.

I won't address the attorney's fees issues because I think you said we will address that later.

THE COURT: No. We will talk about that.

MR. GUPTA: Just on the issue with Mr. Kozich. We have spent a fair bit of time with the class administrator and with the government's counsel to get to the bottom of this. It's not the case that Mr. Kozich's account hasn't been found. His account has been found. He does, in fact, have a Pacer account and has long had one.

It's just the case that during the class period he did not pay any Pacer fees and, therefore, there is nothing to reimburse. I do have some sympathy for him. He said he is a disabled veteran who is trying to use court records to solve problems that he has. It sounds like he is exactly the sort of person on whose behalf the case was brought. It so happens that if he didn't pay fees during the Pacer fee [sic] he does not have a claim that is compensable here.

That is really all I wanted to say, if the Court

has questions.

THE COURT: I have one question about something he said which may not apply to him but might apply to others; I would like a response. It's actually on page 3 of his filing, Docket No. 163.

He says: The settlement refunds only those persons who paid more than $350 in excessive Pacer fees but is paying zero to those to people who paid less than 350. His argument, as I read it, is -- putting aside whether he qualifies. His argument, as I read it, is: If I paid $351 over time, I would get $350.

If you paid $100, you get zero.

MR. GUPTA: And that is just factually incorrect. It's a misreading of the settlement.

I would point you to page 6 of the settlement agreement, paragraph 19, which explains how the first distribution works.

It says, in the first distribution: The administrator allocates to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in Pacer fees by that class member for the use of Pacer during the class period. So it's either 350 or the lesser. If you pay $100 or even $1, you are going to get that back.

Then, once you do the pro rata distribution, if

you paid 151, you are going to get that $1 back as well. I think that is just a misunderstanding.

THE COURT: Okay. I just wanted to clarify.

Let me see if the government has anything they would like to say in response.

Mr. Narwold?

MR. GUPTA: Yes. Would the Court like to hear about any of the other objectors? I do think we have addressed them in our papers.

THE COURT: I don't have any specific questions.

I have read the papers and I have read your responses, and they're standing on their papers.

MR. GUPTA: Thank you.

THE COURT: I will evaluate what they have had to say in view of your responses.

MR. GUPTA: Thank you.

MS. GONZALEZ HOROWITZ: Your Honor, I don't really have much to add beyond what's already been put into the record.

We did address this issue of the concern about compensating smaller users in my opening remarks to the Court and how that is consistent with the text of the statute, so I would refer the Court back to that.

As to Mr. Kozich, we concur with class counsel. We did some further research as to Mr. Kozich's account. It

is true that he has had an account for many years; however, he did not actually pay any fees during the relevant class period. He has incurred fees during that time. At multiple points he has been granted the fee waiver which is now -- which was $15 at the time; that has now increased to 30.

He has -- I believe he mentioned on the call that he has approximately $354 in an outstanding balance but that has not been paid. And so under the very terms of the class definition, he would not fall as a member of the class. So unless the Court has any other questions for me, we agree with the statements by class counsel as to the responses to the objections.

THE COURT: Good. Thank you very much.

Why don't we take 15 minutes or so. No more than 15 minutes.

I think the logical way to proceed, unless you disagree, is to hear from Ms. Oliver on the opt-outs for the 34 people who say they are trying to opt out at this state and, then, to hear from counsel on legal fees and Mr. Isaacson on legal fees. Thank you.

(Whereupon, a recess was taken.)

THE COURT: So I have one follow-up question from earlier. I am not sure whether it's for Mr. Gupta or Ms. Oliver, or both.

It has to do with this question of -- the fact

that some -- let's suppose I am a partner at a law firm and I send out my bills and I include the hours, the hourly rate, and all that stuff; but I also include all of the costs and expenses. And a portion of it is for the work I did for finding stuff on Pacer. I am charging my client for it, my client has paid for it.

A couple of questions. One, as I understand it, your argument is -- the legal argument is: It doesn't matter.

The practical answer is that there were notices that were sent out and an administrator received -- sent emails to accountholders, and no one had -- there were a lot of notices sent out; the response was that there were no disputes.

A couple of questions.

One, are these forms or things that were sent out somewhere in the record here? Are they exhibits or were they exhibits in prior filings? If so, where are they?

Secondly, what did you or the administrators -- I guess you said that what the administrator did when they got the forms was to reach out by email. Was anything else done or done with responses?

So those are the practical questions.

The Rule 23 question is -- you say it's not -- it doesn't matter as a matter of law. But doesn't it --

explain to me why it does or does not affect my evaluation of whether the settlement agreement is fair?

So the first few questions are kind of practical. Please help me; explain this to me a little further.

The second one is: My job is to decide all of the Rule 23 issues. Doesn't this affect fair and adequate?

MR. GUPTA: I think -- so first of all, I will just say: I think the way you recounted it sounds to me exactly right. Ms. Oliver can address your practical questions, and then I am happy to speak to the Rule 23 question.

THE COURT: Okay.

MS. OLIVER: So on the practical questions, we -- you mentioned these notices that were sent out. So there were hundreds of thousands of actual notices, court-approved notices that were sent out. This was a different process from that.

So there were notification forms on the website. We have not filed those notification forms with the substance of those notification forms with the Court, but we can do so.

THE COURT: I would just like to see them just for my own --

MS. OLIVER: Once those notifications were submitted, in the case of an individual notifying the

administrator that they had paid Pacer fees on someone else's -- on an accountholder's behalf, then the administrator sent an email and there was no other attempt to contact. It was by way of email to the accountholder saying: Someone has filed a notification letting us know that they paid Pacer fees on your behalf. If you would like to dispute this, here is the process for doing so. We have not filed the substance of that email either, but we can also do that.

THE COURT: Okay. Thank you.

MS. OLIVER: And I think --

THE COURT: Nobody had any disputes.

MS. OLIVER: There were no disputes filed as part of that process.

THE COURT: You said something like about 400 came back.

MS. OLIVER: So we had -- there were 409 of the payment notifications filed. So that's where someone said: I paid Pacer fees on behalf of somebody else. And then there were 464 accountholder notifications where an accountholder notified the administrator that somebody else had paid their Pacer fees and identifying the payor.

THE COURT: Okay. Got it. Thank you.

So you file that stuff, and I will at least see what I have got.

MS. OLIVER: We will.

THE COURT: Now the question is: Does all of this or how does all of this affect fairness and adequacy under the rules?

MR. GUPTA: Your Honor, I think what you said earlier is right. That, as a legal matter, any sort of potential claim that somebody might have for reimbursement against somebody who paid the fees is a matter of law and equity between those people; and that's what the cases we have been able to find where this comes up in a class action context have said.

THE COURT: You mentioned a footnote in your brief. Is that the only reference in the briefs to this question?

MR. GUPTA: That is the only reference. We have raised this in response to an objection by Mr. Isaacson.

There is a Northern District of Illinois -- I will point out we were actually surprised we were able to find a case precisely on this point; it's a relatively esoteric point.

The broader point is one that is well supported in the law; not just in the Tucker Act context but in all sorts of contexts, including an antitrust case that's going back 100 years where you have all sorts of complex payment streams. The question is: What do you do about some

unreasonable charge that was assessed against one person but then it was reimbursed by another person who has the claim?

And the general rule is that there is not a kind of passing-off defense, that it's the person who paid the charge that possesses the claim. That's certainly true under the Little Tucker Act.

THE COURT: On the broader point, is there specific case law you would point us to or anything in Wright & Miller, Professor Rubenstein or in anybody else's treatise on class actions?

MR. GUPTA: Well, I guess I would just point you -- the point that Mr. Isaacson is making about fairness is that he is saying, as I mentioned earlier, that he thinks it was wrong for us to advocate for a pro rata distribution.

In fact, the case law says exactly the opposite, right? I think *Ortiz* is really probably the best case on this.

THE COURT: Which case?

MR. GUPTA: *Ortiz versus Fibreboard*, the Supreme Court's decision.

THE COURT: So it's basically a subset of that point.

MR. GUPTA: That's right.

THE COURT: If you are settling a big class action, I suppose the only other way you would even think

about doing it would be having some classes, and this class is treated that way and that class is treated that way.

MR. GUPTA: Right.

What is weird about his point is that he is saying that we're favoring the big folks. But, in fact, the parties bent over backwards to engage in a settlement structure that has this minimum distribution. So the little guy is -- we are ensuring that the little guy is getting paid. I think that's the principal point I would make. I think it's hard to say that this is an unfair settlement for that reason.

One last point which is: There are a lot of really big users in this class who are not law firms, they are data companies, they aggregate the date, and they don't have this reimbursement issue, so it's important that they get to be able to recoup what they have paid. Thank you.

THE COURT: Does the government have anything to add on this point?

MS. GONZALEZ HOROWITZ: No, Your Honor. I don't think we have anything to add.

MR. KOZICH: Your Honor.

THE COURT: Yes, sir.

MR. KOZICH: Can I chime in?

THE COURT: On what?

Very briefly. What do you want to talk about,

what we have just been talking about?

MR. KOZICH: Well, it's related. The Department of Justice said that, basically, I have paid Pacer fees. I am not part of the class action. I apologize. I thought that the settlement was saying that the people paid less than 350 are not getting paid; I misread it. I read it again. You are correct.

My point is that I would like the Pacer people to go in and reopen my account so I can use Pacer. I will pay the $4 and some cents that I owe that's a requirement; but I would like the Pacer people to reopen my account if we can do that.

THE COURT: All right. Well, maybe before the hearing is over, the government can tell you who to talk to or who to email, or something like that. Okay?

MR. KOZICH: Okay.

THE COURT: So back to where we were.

I said, before the break, that I was going to ask Ms. Oliver to explain the 34 objectors [sic] and what, if anything, we do about that at this point, and then we'll move on to the attorney's fees questions.

MS. OLIVER: Before I get to the opt-outs --

THE COURT: The opt-outs, I misspoke. The opt-outs.

MS. OLIVER: Mr. Gupta had mentioned the numerous

class member contacts that we have been handling. This is our internal log (indicating) of those contacts, emails, and phone calls. I have handled a number of them. I have reviewed a number of drafts that Ms. Loper and another lawyer back at our office have handled; so we have been personally handling them. There is no call center and there are no customer service representatives, though, some days, boy, I wish there were because we've spent a lot of time on those.

Opt-outs. In 2023, there have been 33 timely opt-outs. I believe the number in the filings was 34. We identified a duplicate entry in there, so it's really 33; the same person with the same claim ID, there were two of those received. 16 additional were untimely. When I say "untimely," I don't mean they filed 12 hours later; they filed two days late. They all had an opportunity to opt out in 2017.

THE COURT: Well, they had an opportunity to opt out in 2017. And then, pursuant to the notice that was sent out, they had a new opportunity to opt out, right?

MS. OLIVER: We did not -- so the new class period --

THE COURT: I see.

MS. OLIVER: They had an opportunity to opt out in 2023. But everybody who was a part of the earlier certified

class from April 21, 2010, through April 21, 2016, had an opportunity to opt out in 2017. They were not given another opportunity to opt out in 2023.

There were ten individuals in 2023 who attempted to opt out, they received the incorrect notice.

THE COURT: That's in addition to the ones you have just been talking about?

MS. OLIVER: So there were 33 that were timely and, then, there were 16 that were not timely. Within the 16, 10 of those individuals received the incorrect notice that told them they had an opportunity to opt out. All 10 of those -- three of them were actually federal government employees. So the 7 who were not federal government employees and received the incorrect notice were then sent a corrective notice saying: We goofed, you got the wrong notice. You had an opportunity to opt out in 2017; you no longer have an opportunity to opt out.

THE COURT: Okay.

MS. OLIVER: And then there were an additional 6 individuals who received the correct notice in 2023 from the get-go. And they tried -- they sent in -- so because they were part of that earlier 2017 group, the website would not let them do it in 2023. They sent in paper forms trying to opt out, but they already had an opportunity to opt out in 2017. So all of the so-called invalid or late opt-outs in

2023 had an opportunity to opt out in 2017.

THE COURT: So the bottom line is those that were filed -- it's because the settlement created a new subclass or new time period --

MS. OLIVER: That's right.

THE COURT: -- an additional time period.

MS. OLIVER: That's right.

THE COURT: So with respect to the people that got in because of the new time period, they were considered timely, and they opted out.

MS. OLIVER: Yes. And there were 33 of those.

THE COURT: Right.

With respect to the others, either because they misunderstood from the get-go or because they were inadvertently misled, they were ultimately not allowed to opt out because they missed their opportunity.

MS. OLIVER: Correct.

THE COURT: And that explains the whole thing.

MS. OLIVER: Yes. I hope so.

THE COURT: It did.

MS. OLIVER: Thank you.

THE COURT: So let's move on to the attorney's fees question which is -- everybody agrees that class counsel is entitled to attorney's fees.

The issues, as I understand them, are: One,

lodestar versus percentage with the subset of percentage of -- percentage with lodestar cross-check. And the other question is: How much?

So I think those are the questions.

MR. GUPTA: I am happy to start, Your Honor, but please jump in if I can help out.

So I think, as you said earlier, there are two approaches; there is the percentage approach and the lodestar approach. The lodestar approach is generally used outside of common fund class actions the federal circuit has recognized; it's used in garden variety fee shifting cases where there is a statutory fee and it comes out of the defendant's pocket.

The percentage approach is the prevailing approach in common fund class actions. So courts in common fund class actions overwhelmingly prefer the percentage of the fund approach. For reasons that you recognized in your Black farmers case, the reason that courts have gravitated to the percentage approach is that it helps align the interests of the lawyers more closely with those of the parties by discouraging the inflation of attorney hours and promoting efficient prosecution and resolution of litigation which benefits the litigants and the judicial system.

So I don't take the government to be quarrelling with the notion that the percentage approach is the

appropriate approach here. I actually don't take them to be quarrelling even with the percentage that we have proposed. There is one objector, Mr. Isaacson, who does quarrel with all of that; we can get into that.

I thought it might be helpful -- just in talking about the percentage -- to give you some background here because this is an unusual class action in which there was actually a negotiation between the two parties about the percentage.

First, the retainer agreements with the class representatives provide for an attorney fee of 33 percent.

THE COURT: It's contingent.

MR. GUPTA: Correct. Correct.

THE COURT: So, again, if there was no success --

MR. GUPTA: Correct.

THE COURT: -- even with that retainer agreement, they get zero.

MR. GUPTA: Exactly. That is the standard kind of contingency fee arrangement in plaintiffs' class action litigation and other kinds of contingency litigation. So that's -- paragraph 65 of my declaration mentions that.

Then the notice that was sent out to class members said: By participating in this class action, you agree to compensate counsel at 30 percent of the recovery. That's ECF 43-1 and 44.

So we're going from 33 percent down to 30 percent. Then, as I mentioned, we have this unusual negotiation with the government. In the mind run of class actions -- and Mr. Narwold or Ms. Oliver can speak to this, they have done many, many class actions -- you don't have a cap of this kind, it's just left to the discretion of the Court. But here --

THE COURT: Even a common fund?

MR. GUPTA: Yes. The cap is unusual even in a common fund fee where there is already -- before this comes to you in arm's length negotiation about what that cap is, we agreed with the government to cap any fee and expenses at 20 percent of the common fund; and then, now what we're requesting is a fee of 19.1 percent.

The upshot of all of that is that the percentage that we're requesting is well below the standard one-third recovery and is even below the average for settlements of this range. Professor Fitzpatrick goes into this in some detail in his declaration, and you will see this at paragraph 19 of his declaration. For settlements that are within the range of 70 million to 175 million, this percentage is below even the average within that range.

Then, as you heard, the government -- this is also, in our experience, quite unusual in a class action. The defendant is coming to you and saying: This is an

outstanding result for the class members; this is a landmark settlement.

So we think this is a humbly, I would say, better than average class action and a better than average class action settlement. Even if you are looking at the average run-of-the-mill class action settlement, the fee that we're requesting is well below the average.

Then I think that raises this question of lodestar cross-check. There has been a lot of ink that's been spilt about precisely how one does the cross-check. I think I was saying to my friend from the government in the hallway during the break, I think you actually have helped us out. They pointed out some things that we had not provided the Court with that would -- if you choose to do a lodestar cross-check, and it's entirely within the Court's discretion -- that would aid the Court's process in performing that lodestar cross-check and, hopefully, getting some comfort that this is a reasonable fee. Whether you are looking at it just from a straight percentage standpoint or whether you are looking at it based on the multiplier in the case. So you have the discretion to do that. I hope that we have given you the tools necessary that, if you choose to do that --

THE COURT: You will provide additional tools you say?

MR. GUPTA: No, no. I think we have.

THE COURT: I thought you said she had suggested there were some things she should --

MR. GUPTA: Let me try to say this a little more clearly.

What I am saying is that the government's filing, their response, raised a number of questions and issues that were exclusively trained on the question of how one would do the lodestar calculation. Now, we could have just taken the position that: Look, all of that is irrelevant because the correct way to do this is it's a percentage fee and our percentage fee is reasonable. That is our frontline position.

But we didn't stop there. We also provided information and expert reports that I hope show the Court that: Even if one were to do the cross-check route, that the percentage fee that we're requesting is well within the range of reasonableness.

I am happy to answer any questions the Court may have about either the percentage approach or the cross-check but, hopefully, that's a helpful kind of orientation.

THE COURT: As I understand it, the D.C. Circuit may or may not have set out some factors. The federal circuit -- maybe the D.C. Circuit has and the federal circuits are slightly different, but they are pretty

comparable.

MR. GUPTA: They are pretty similar. And honestly, they are pretty similar across the circuits. We organized our brief around the federal circuit's factors in the *Health Republic* case.

THE COURT: Do you think, as you read federal circuit's -- not this decision, I don't think.

MR. GUPTA: The *Health Republic* case?

THE COURT: Do you think that that decision requires a lodestar cross-check?

MR. GUPTA: I don't think that it does. And in fact --

THE COURT: There is some language that suggests it's a little stronger than a recommendation. I can't find it right now.

MR. GUPTA: The court says: We are not deciding that question; that's Footnote 2 of the decision.

It was an unusual case because the class notice in that case said: We will do a lodestar cross-check; and then they didn't.

So in one sense, it's a very easy case. The holding of the case is: When you say you are going to do something, you need to do something. Right?

THE COURT: Because that's what the class relied upon when they got the notice.

MR. GUPTA: Right. And I think, also, there were some judicial eyebrows raised because they said they would do this cross-check and, then, the fee was 18 or 19 times the hourly rates. But the holding -- the holding is one that is inapplicable here, which is: If you say you are going to do it, you have got to do it.

Now, the court said it wasn't deciding the question of whether a lodestar cross-check was required. But in Footnote 2 of the decision -- I just want to be candid about this. The court points out why a cross-check might be warranted. And I can see why it was warranted on the facts of that case. So the federal circuit hasn't decided the question.

But if you were to write an opinion that's like your Black farmers' decision that says: Look, the percentage requested here is reasonable; but, in addition, a lodestar cross-check would only confirm that result. I think that is something that would probably be greeted well by the federal circuit given the language in this decision.

THE COURT: What are the most -- what are the common fund settlement decisions of the courts that are most comparable to the situation we're facing here. Don't feel like you have to say "Black farmers."

MR. GUPTA: Well, which aspect of this situation, if I may ask?

THE COURT: Well, I guess only than the Swedish Hospital and Health -- whatever it's called -- in the federal circuit, in my own decision in Black farmers, are there other cases that you say, "Aha! This one is really a lot like what we're facing here" for whatever reasons?

MR. GUPTA: I mean, you named the ones that I would point to. And I would say on *Health Republic* I hope I have persuaded you that it's actually super different.

THE COURT: Which one?

MR. GUPTA: The *Health Republic* case is very, very different from this one. Right? I think those are the cases that I would point you to.

We also cite a number of Court of Federal Claims cases in our submission; the *Moore* case, the *King County* case, *Quimby* case. The reason we cite those is it -- in effect, when you are a federal district court in the Little Tucker Act case, you are kind of sitting as the Court of Federal Claims, so we think those are analogous. They are also cases involving large claims against the federal government, so I think they're analogous.

THE COURT: Helpful. Thank you.

I will hear from the government.

MR. GUPTA: Thank you.

MS. GONZALEZ HOROWITZ: Just so it's clear on the record, Mr. Gupta did say to me out in the hallway that, you

know, "I think I helped you." And for the record, my response was, "I know."

Your Honor, I am happy to answer any questions you may have. I think we do agree, as a general principle, that the D.C. Circuit case law appears to be pretty clear that the percentage of the fund method is the preferred approach in a common fund case such as this one; that's from the Swedish hospital case.

We have talked at length about the *Health Republic* case. I think, like this Court identified, it perhaps suggested strongly that not just in situations where it is required in a class notice to conduct a lodestar cross-check, but the Court, as a general matter, may conduct the cross-check anyway just to assure itself that the amount that is requested is reasonable. Because, ultimately, that is well within the Court's decision, is to determine what is the reasonableness of the fee.

The government had raised some concerns in its filing about the initial submission that plaintiffs made with respect to the justification and the declarations about the lodestar. I think some of those concerns have been remedied by the documentation that was supplied on reply. Ultimately, it's within this Court's discretion to conduct a cross-check. But plaintiffs have now provided the Court with some additional information, not just about their

lodestar at the rates at which they have requested but, also, their lodestar at the Fitzpatrick matrix rates which the government had noted for the Court essentially has been considered by other judges in this district as a baseline in federal complex litigation. And, of course, as we recognized in our filing, those cases were not class action cases but they are cases that talk extensively about the going market rates in this district and what complex federal litigation looks like. I am referring there to the *Brackett versus Mayorkas* decision by Chief Judge Boasberg and, also, the *J.T.* decision that we cited in our brief by former Chief Judge Howell.

Unless the Court has any questions -- actually, I would also point the Court to one additional case that I think I don't believe I heard class counsel mention but I think would be analogous; it is a Court of Federal Claims case. But that would be the *Mercier versus United States*, and that's 156 Federal Claims, Fed Claim 580. It's from 2021.

THE COURT: I do have one or two questions.

In your initial filing, as I understand your position, you agree: Percentage of the common fund in the common funds case, not lodestar. And you think that lodestar cross-check is at least a good idea and, possibly, D.C. Circuit has suggested it should be done -- or the

federal circuit?

MS. GONZALEZ HOROWITZ: Just to clarify, the federal circuit, I think, has perhaps stated a stronger emphasis on the cross-check than the D.C. Circuit has.

I think the D.C. Circuit was perhaps a little less convinced in the Swedish hospital case but, certainly, the decision from the federal circuit is from earlier this year, so I think that would be persuasive to the Court's analysis. But, ultimately, the circuit case law in this District holds that it's within the Court's discretion to conduct the cross-check.

THE COURT: Now, I was going to say the $64 million question but, really, the $23 million question is, in your initial filing, you argue that the 19.1 percent, or whatever it is, that leads to about a $23 million award is too much. You didn't tell me what you thought was appropriate.

So my two questions are: In view of subsequent filings, do you still think that that is too much in this case. If so, where does the government come out in terms of a dollar amount or percentage amount?

MS. GONZALEZ HOROWITZ: So I want to be clear, Your Honor, we didn't oppose plaintiffs' request for 23.8 million. I didn't read our filing to mean that we believed that the 19.1 percent was inappropriate or that it

should be reduced. Ultimately, that is well within the Court's discretion as to what to award. We are not taking a position on whether the 23.8 is reasonable.

We believe that there were some holes in the filing that have been addressed by plaintiffs, by class counsel, on reply about how it is that they came to that lodestar and whether the -- taking aside whether the 19.1 is reasonable, I think everyone agrees the case law, in this District at least, has suggested that anything from 15 to 45 percent in a common fund case may be appropriate and, of course, that's always depending on the circumstances of the particular case.

Ultimately, if the Court found that 19.1 here, which is slightly below the threshold that the parties had negotiated in the settlement agreement, is appropriate, we wanted to ensure that the Court had sufficient information in the record to base its decision in awarding the full amount of fees. And I think that plaintiffs have done some of the legwork on the back end to address those concerns.

So I just want to be clear. We're not specifically advocating for a reduction, but we had some concerns about how that amount was calculated.

Certainly, we also pointed to the case law about the multiplier. In this case I think, again, the D.C. Circuit has suggested that it can be between 2 to 4

percent depending on which lodestar the Court is working off of; the ranges here can be slightly higher. Of course, there has been some case law in the federal circuit that has suggested that perhaps it should be on the lower end, closer to the 2 percent. Again, that is within the Court's discretion to determine.

THE COURT: Okay. Thank you for clarifying your position. Actually, it's not a clarification. I think that it's -- your position is about, because the plaintiffs have filed more supporting documentation for what they're requesting. Thank you.

MS. GONZALEZ HOROWITZ: Thank you.

THE COURT: So I will hear from Mr. Isaacson.

Mr. Isaacson, you already made some points with respect to attorney's fees earlier so why don't we -- please try not to say the same things you have already said; I have heard it, we took notes on it. We have a transcript we are going to look at. Whatever additional points you want to make about attorney's fees and/or responses to what has been said.

MR. ISAACSON: Absolutely, Your Honor.

One of the things that was said was that there were retainer agreements signed for one-third of the recovery, 33 percent. The retainer agreements do not bind the class and they do not bind this Court.

THE COURT: Correct.

MR. ISAACSON: There was a statement that an earlier class notice said: You agree to 30 [sic] percent if you don't opt out. I did not agree to 30 percent.

I saw that notice and I said to myself: If they try to enforce that, I am objecting because that is wrong; that is not enforceable. It was grossly inappropriate.

They sent a new notice that supersedes that older notice saying I can appear to object to the attorney's fees. So the notion that there is some kind of binding effect of that first notice is --

THE COURT: I don't think there is a binding effect on me of anything.

MR. ISAACSON: Pardon me?

THE COURT: I don't think there is a binding effect on me of anything.

MR. ISAACSON: That's true.

THE COURT: You have pointed out and we have all read Rule 23(e). You have specifically pointed out the subpart that talks about how fees are a part of fair and adequate.

MR. ISAACSON: Absolutely, Your Honor.

They say that the standard is one-third. Well, that's in personal injury cases. Personal injury cases are extremely labor intensive; they don't have the economy scale

the big class actions do. One-third is not the appropriate reference.

On the question of whether *Health Republic* requires a consideration of the lodestar, I think it does. I think lodestar needs to be considered in determining a reasonable percentage, quite frankly. It's more appropriate to take the lodestar amount up front to determine the percentage than it is to try to bring it in at the end as merely a cross-check.

Now, there are judges like former Chief Judge Vaughn Walker of the Northern District of California who wrote an article saying that judges have an ethical duty to consider the lodestar. I think it was published in the *Georgetown Journal of Legal Ethics*; there was a co-author whose name escapes me at the moment.

The Swedish hospital case was mentioned, that's a D.C. Circuit case which says that: In common fund cases, attorney's fees must be awarded as a percentage of the fund. The Eleventh Circuit also has held that in a case called Camden I Associates -- *Camden I Condominium Association*, pardon me. They are the only two circuits that have held that, and their holdings are in conflict with Supreme Court authority.

THE COURT: Which Supreme Court authority in particular?

MR. ISAACSON: The foundational decision established in the common fund doctrine, *Greenough* -- *Trustees versus Greenough*; the same one that I rely on with respect to incentive awards.

In that case, the court established the common fund doctrine, saying that the class representative could receive compensation from the common fund reimbursing him for his actual outlays incurred. There was no percentage in that case.

The later cases, the Eleventh Circuit in *Camden I Condominium Association*, the D.C. Circuit in Swedish hospital -- and I think they both rely on a district court case called *Mashburn*; it might have been out of the District of Alabama. They all say that *Greenough* was a percent fund case. It wasn't. I mean, the trend toward the percent of fund misrepresents the foundational decisions of the Supreme Court. The first one was not percent of fund. The second one, *Pettus*, that was percent of fund. The lower courts awarded 10 percent. The Supreme Court said that's excessive and cut it to 5 percent.

There are cases, I think, from the '20s and '30s where the Supreme Court deals with common fund or equitable fund fee awards. I don't believe it has ever approved of a common fund fee award or equitable fund fee award that exceeded 10 percent. So the notion that there is a

benchmark of 25 percent or a much higher amount is at odds, again, with the Supreme Court decisions.

The *Mercier* case was mentioned. I think *Mercier* is quite relevant; I mean, it's one of the cases Rubenstein included in his comparators when he deconstructed Fitzpatrick's matrix. That's a case where there was a 65 percent recovery, not 25 percent like in this case. Fitzpatrick was the expert witness in that case and recommended a 30 percent fee award that amounted to a multiplier of 4.4. The Court said, no, that's way too much; that's a windfall. I think you need to consider the lodestar in setting the amount of the fee.

I think that a reasonable amount of the fee in this case -- 5 percent will more than cover their claimed lodestar. 10 percent would be more than double their lodestar; a multiplier of two. 20 percent is way too much.

I also want to note that another case that's often cited as a percent of fund case, the Supreme Court's decision in *Boeing versus Van Gemert*, a 1978 decision. The fees in that case ultimately were awarded on the lodestar basis; they were not awarded as a percentage of the fund.

I spent many years with plaintiffs' class action firms where, quite frankly, the firm management regarded percent of fund fee awards as the way to get paid the most money as quickly as possible. If you look at a single case

and focus only on one case and imagine that is the only case that a law firm is ever going to try then, yeah, it makes sense to think that they're going to try to maximize the recovery in that one case so that they can get a larger -- a percentage of a larger amount; that's not how the Court -- how law firms run their practice. They have a portfolio of cases.

In the class action practice, the assumption is that the defendants are going to settle quickly for a fraction of the damages; you can put minimum work in for a fraction of the damages settlement; and based on the minimal hours put in, your percent of fund award will amount to a large multiplier. That's how you get paid the most. That is not something that maximizes the interests of classes and recoveries and it, quite frankly, in the long run, does not align the interest of the classes with the interests of counsel.

THE COURT: Okay. Are you almost done?

MR. ISAACSON: I am almost done.

I would also note that when they talk about their projected lodestar for any appeal in the matter, to the extent that an appeal is focusing on attorney's fees, they're not entitled to recover for their work -- applying for or defending attorney's fees in a common fund case.

Because Professor Rubenstein and Professor

Fitzpatrick are not here to be cross-examined and because I think that their opinions submitted in this case are, with respect to the later ones, untimely and unreliable, I respectfully move to strike them. I move to strike them as hearsay; they are out-of-court statements to be taken for the truth or falsity of the matters asserted --

THE COURT: I am not sure whether an objector has standing to move to strike. If you want me to disregard them for the reasons you have --

MR. ISAACSON: I respectfully request you disregard them, Your Honor. Thank you very much.

THE COURT: Thank you, Mr. Isaacson.

Mr. Gupta.

MR. GUPTA: I will try to be brief because it's been a long day, but I do want to make sure that I answer any questions you have.

I would just emphasize at the outset that I hope I wasn't misunderstood earlier. I was not at all suggesting that anything that I was reciting was binding on the Court with respect to those agreements. I think the Court has absolute discretion and, in fact, a duty to assure itself that the absence --

THE COURT: Somebody said -- I don't know whether it was Mr. Isaacson or one of the parties -- I have fiduciary obligations.

MR. GUPTA: Yes. The Court acts as a fiduciary on behalf of the absent class members. And your role here is important because there might not otherwise be adversarial presentation. And the danger with a class action is that lawyers are going to sell out their clients in exchange for red carpet treatment on attorney's fees, and courts have to be on guard against that. Now, we don't think this is remotely a case of that kind.

You heard what the government said about the quality of settlement, the risks involved. We're proud of this case. But I also think that the Court's duty here is important. I think, just as I mentioned earlier there was a kind of dog that didn't bark, the dog that didn't bark here is you have very sophisticated players in this very, very large class that are paying the fee -- that are going to pay the fee that we're asking and none of them are here objecting. I think that's notable.

The argument that Mr. Isaacson is making about how courts should handle attorney fee applications in reliance on this 1882 case, *Trustees versus Greenough,* is one that, as far as we can tell, has been rejected by every one of the federal circuits, including in many cases in which he has been an objector which he doesn't acknowledge in his objection.

If you want to read one of those cases, I might

recommend a district court case from a few years back by Judge Ali Nathan in New York; it's the *Bioscrip* case that is cited on page 12.

THE COURT: I mean, without prejudging anything, she's one of the smartest judges I know in the whole country.

MR. GUPTA: Yes. It won't surprise you to know that it's a pretty darn scholarly opinion and it rejects these arguments, as I have said, as have many other circuits.

THE COURT: What's the cite? I'm sorry.

MR. GUPTA: That is 273 F. Supp. 3d 474. You can take a look at page 478 to -89.

What she explains is that Mr. Isaacson's argument that there is a presumption against lodestar enhancement in fee shifting cases, that just doesn't apply in the common fund context. The common fund context is quite different.

So I think that that set of arguments has been roundly rejected. I can't prevent Mr. Isaacson from taking an appeal. And I don't have -- as I did with the service awards, I don't have a kind of factual argument that will take that issue off the table because his attack is a categorical attack on the way things are done. He is entitled to make that argument, and I hope he has had a fair hearing. I don't really have anything else to add unless

the Court has questions.

I thank the government for pointing out some holes in our filing and causing us to file the things we filed in reply. I hope that gives the Court the tools it needs to decide this request. Thank you.

MS. GONZALEZ HOROWITZ: Nothing further by the government.

THE COURT: Well, it seems to me that I have everything I need except for the few things that Ms. Oliver is going to file to edify me about what's going on on the administrative side of things.

I know what my responsibilities are. I think that the filings from both sides in the presentations from counsel this morning, as well as from Mr. Isaacson and Mr. Kozich, have been very, very helpful. I don't think I need anything more than what I already have, other than those few little educational informative things. I will try to get to this as soon as I can. It's an important case.

Again, I have to decide whether it's fair and accurate, how significant it is, and the contributions made by counsel and everything.

You know, this tool of Pacer and electronic filing, as I said at the beginning, has revolutionized the federal courts in the practice of law. What we're talking about here is very, very important to a lot of people and

institutions. It involves a lot of money. But everyone has to be appreciative of whoever developed these technologies, the Administrative Office of the Courts for -- Congress and the Administrative Office of the Courts for making the court system more accessible to the public and to lawyers and to everybody through electronic filings and through Pacer.

The AO has done a terrific job and the leadership of the Chief Justices -- I guess it started with Justice Rehnquist and Justice Roberts -- the directors of the Administrative Office, among others, and their staffs.

I know that our lives are a lot easier; lawyers' lives are certainly a lot easier. We need to put this in the perspective of: We have come a long way, not just since quill pens. But, frankly -- this is a digression. It's late in the morning.

When I was clerking back here in the old building for Judge Aubrey Robinson, we heard motions hearings. Now we have an individual calendar system; you know who your judge is from the beginning of the case, unless she retires and dumps things on other judges.

We had a master calendar system. You would look at the docket and you may have seen five, six, seven different judges in a case. On Wednesdays somebody from the clerk's office would come up with these piles of files -- some of you may go back that far -- with these piles of

motions and say: Here are the civil motions for Friday. There might be 30 of them, nothing is electronic; it's all like this (indicating). Judge Robinson would say: Okay, you take half, I will take half. Let's start reading -- Judges only had one clerk in those days -- let's start reading; we'll talk on Thursday afternoon. They may still do it that way in the Eastern District of Virginia; I have argued there. They decide most things from the bench there. They probably think that we can decide from the bench here more frequently, too, but we don't do that so much anymore. So times have really changed. That having been said, I am not going to decide this from the bench. Thank you, all, very much.

THE COURTROOM DEPUTY: This court is adjourned.

(Whereupon, the proceeding concludes, 12:49 p.m.)

* * * * *

CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 15th day of May, 2024.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

D

T

U

V

W